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REVIEW OF FURTHER DEVELOPMENTS IN FIELDS WITH WHICH THE SUB-COMMISSION HAS BEEN CONCERNED

HUMAN RIGHTS AND THE ENVIRONMENT

Preliminary report prepared by Mrs. Fatma Zohra Ksentini, Special Rapporteur, pursuant to Sub-Commission resolutions 1990/7 and 1990/27

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Introduction

1. By its decision 1989/108 of 31 August 1989, adopted without a vote, the Sub-Commission on Prevention of Discrimination and Protection of Minorities asked Mrs. Fatma Zohra Ksentini to prepare, without financial implications, a concise note setting forth methods by which a study could be made of the problem of the environment and its relation to human rights. The Sub-Commission also decided to request the Secretary-General to invite Governments, United Nations bodies concerned, specialized agencies, intergovernmental organizations and non-governmental organizations to submit relevant information and observations, preparatory to the working paper.

2. The Commission on Human Rights, for its part, adopted on 6 March 1990 resolution 1990/41 entitled "Human rights and the environment" in which it affirmed its awareness of increasing environmental degradation and underscored the link between preservation of the environment and the promotion of human rights. It welcomed the Sub-Commission's decision to have a note prepared for its forty-second session on methods by which a study on the problems of the environment and its relation to human rights could be made.

3. In response to these requests Mrs. Ksentini, Special Rapporteur, submitted to the Sub-Commission at its forty-second session a note containing a number of proposals for a study of the problem of the environment and its relation to human rights (E/CN.4/Sub.2/1990/12). After examining this note, the Sub-Commission adopted on 30 August 1990 resolution 1990/7, requesting the Special Rapporteur to present a preliminary report at its forty-third session. By its resolution 1990/27 the Sub-Commission invited the Special Rapporteur also to take into account, in her study on human rights and the environment, the special relationship between fragile habitats and indigenous peoples, especially with respect to sustainability.

4. The Commission on Human Rights, in its resolution 1991/44, requested the Special Rapporteur to complete the study on human rights and the environment and to submit the relevant report to the Sub-Commission at its forty-third session. The Economic and Social Council, in its decision 1991/244, approved the recommendation of the Commission on Human Rights.

5. On the basis of the terms of reference assigned by the Economic and Social Council, the Commission and the Sub-Commission, the Special Rapporteur submits to the Sub-Commission this preliminary report on the question of the environment and its relation to human rights.

Chapter I

GENERAL INFORMATION ON THE RELATIONSHIP BETWEEN HUMAN RIGHTS AND THE ENVIRONMENT

A. Analysis of certain concepts

6. In 1972 States expressed, at least in form, their concern to protect the environment in an instrument - the Declaration of the United Nations Conference on the Human Environment, sometimes known as the Stockholm Declaration of 1972 1/ - which, although not binding, doubtless makes a point in favour of giving attention to the matter. The Conference proclaims in its principle 1 that "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations". Another instrument establishing a regional system for the protection of human rights, the African Charter on Human and Peoples' Rights, adopted in June 1981, declares in its article 24 that "All people shall have the right to a general satisfactory environment favourable to their development".

7. Some axioms set out in the Stockholm Declaration seem particularly significant in this connection; suffice it to mention the fear that the relationship between man and the environment may deteriorate as a result of unreasonable use of human potentialities. 2/ But if we may speak of a "spirit" of the Declaration, the cooperative aspect would seem continuously to preside over it, both as regards the subjects of law called upon to play a part in the context of the environment 3/ and in the area of liability when damage is done to the environment. 4/ Moreover the reference to cooperation is not a matter of chance; if we are to believe certain propositions advanced in the literature not long ago, current international law has gone beyond the attitude of a system of values based on antagonism between States (whose legal relations are governed by obligations "not to do" something) and is based nowadays on the idea of common interest to be achieved through an obligation "to do" something. 5/

8. On the basis of these few remarks, the question arises whether the evolution of law now enables us to progress from a law of the environment to a right to the environment. The approach adopted will accordingly be to outline a possible legal obligation as a basis on which to affirm the right to a healthy environment as a fundamental human right.

9. According to A. Kiss, "all international instruments protecting human rights constitute ... declarations, commitments expounding principles which in most cases cannot be put directly into practice". 6/* This difficulty is keenly felt in the area of the environment, where the problem of justiciability presents vital problems of substance; although "the rights guaranteed to every human being necessitate not only legislative rules providing for their

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* Translator's note. In the absence of the English text, any passage marked with an asterisk has been translated from the French.

realization, but also procedures ... to ensure their effective application", 7/* the right to the environment is thus "a 'procedural' right, implying that certain procedures exist and are at the beneficiaries' disposal so that effective recourse may be had to a competent jurisdiction". 8/*

10. It proves a much more difficult task to define the right to the environment from a substantive point of view; once it has been said that "Whereas respect for traditional rights is guaranteed by abstention on the part of the State, intervention by the State authorities is here an essential element in rendering the right effective", 9/* the main problem becomes that of legal classification. Is it possible to speak of a "right to a healthy environment" in isolation, or should this problem be reduced to that of a right claimable through other rights whose realization would be affected by an environment unfavourable to their implementation?

11. At this preliminary stage in our study, let us endeavour to see whether the content of certain international and regional instruments points to a relationship between the environment and human rights.

B. Provisions of various international instruments on human rights which relate to the environment

12. Although the provisions of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights do not expressly establish any relationship between the environment and human rights, article 3 of the Universal Declaration and article 6 of the International Covenant refer to the right to life as inherent in the human person. Furthermore this right is linked to a number of other rights. Thus, if the right to health, suitable working conditions, decent living conditions and so on was not respected, the right to life would be endangered; conversely, when that right is respected, the right to life is respected also. Hence, the question of the effect of the environment may be fitted into the same line of argument. A healthy and well-conserved environment would be a prerequisite for a healthy life.

13. Furthermore there are other rights which cannot be properly realized in the absence of a healthy environment. This applies to the economic, social and cultural rights stated in article 25 of the Universal Declaration of Human Rights and reflected in the International Covenant on Economic, Social and Cultural Rights, in particular "the right [of everyone] to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care ..."; these rights may be endangered by degradation of the environment.

14. Consequently the provisions of the relevant international and regional instruments should be studied in the light of the multidimensional aspects of this "right to the environment". It will therefore be appropriate to mention the content of the existing standards on the subject and to examine the applicable provisions in order to try to identify the beneficiaries and analyse the machinery set up to apply the existing provisions at the international level. Besides being mentioned in the two instruments just cited, this "right to the environment" is reflected in several other international instruments.

15. In its article 24 the African Charter on Human and Peoples' Rights states a principle of undeniable political scope: "All people shall have the right to a general satisfactory environment favourable to their development."

16. The Additional Protocol to the American Convention on Human Rights (San José, 1969), which relates to economic, social and cultural rights, was adopted at San Salvador in 1988 but is not yet in force, contains a clause concerning the right to an environment. Article 11 provides that everyone shall have the right to live in a healthy environment and to have access to basic public services; the States Parties are required to promote the protection, preservation and improvement of the environment.

17. The view taken at OECD is that the promotion of a "decent" environment should be recognized as one of the fundamental human rights. 10/ In the declaration adopted at the Second European Conference on Environment and Human Rights (Salzburg, December 1980), the right of everyone to a healthy environment favourable to his full development and ecologically balanced is affirmed. 11/ The Declaration of Rights and Fundamental Freedoms adopted by the European Parliament in April 1989 binds the Community institutions to take the necessary measures to attain the objective of the preservation, protection and improvement of the quality of the environment.

18. Some instruments make it mandatory to promote participation by individuals and groups. Principle 23 of the World Charter for Nature provides that all persons shall have the opportunity to participate in the formulation of decisions of direct concern to their environment. In the draft final document of the Sofia meeting on protection of the environment (October-November 1989) organized by the Conference on Security and Cooperation in Europe, the participating States enunciate the right of individuals, groups and organizations concerned with environmental questions to participate in public discussion relating to the environment.

19. As to the working environment, the standards laid down by the ILO in the conventions and recommendations or codes of practice concerning occupational safety and health may be said to be directly connected with certain rights laid down in articles 7 and 12 of the International Covenant on Economic, Social and Cultural Rights. The protective measures provided for in some of these instruments extend implicitly to protection of the general environment and to enjoyment not only of the rights spelt out in article 12 but also of the rights recognized in article 11 of the Covenant (continuous improvement of living conditions) and article 25 (right to enjoy and utilize natural wealth and resources fully and freely). These protective measures are those prescribed by the standards governing the prohibition or regulation of the use or handling of harmful substances and products such as white lead (Convention No. 13), ionizing radiations (Convention No. 115 and Recommendation No. 114), benzene (Convention No. 136 and Recommendation No. 144) and carcinogenic substances and agents (Convention No. 139 and Recommendation No. 147), and also those prescribed by the general standards of protection and prevention such as Recommendation No. 97 concerning the Protection of the Health of Workers (especially paragraph 3); Convention No. 148 and Recommendation No. 156 (especially paragraph 15) concerning the working environment and especially air pollution; and Convention No. 155 and Recommendation No. 164 (especially paragraphs 3 (a), (d), (h), (i), (k), (m) and (q)) concerning occupational safety and health.

20. Over and above these specific references, it should be mentioned that the Global Consultation on the Right to Development as a Human Right (Geneva, 8-12 January 1990) took the view that the right to life and to security in a healthy and durable environment had to be one of the basic principles of human rights and development because account had to be taken of the needs of future generations through the responsible management, rational exploitation and conservation and protection of the planet's resources in order to guarantee the well-being and dignity of the individual (E/CN.4/1990/9 (Part I), para. 39).

21. There is a more obvious reference in the international instruments concerning the living conditions of vulnerable groups (the handicapped, children, women, victims of international conflicts, ethnic minorities, etc.). Mention may be made in particular of the provisions of the ILO Convention of 1989 (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries. The European Charter on Environment and Health adopted on 8 December 1989 by the First Conference of Ministers of the Environment and of Health of the Member States of the European Region of the World Health Organization (WHO) provides in its principle 3 that the health of every individual, especially those in vulnerable and high-risk groups, must be protected. Special attention should be paid to underprivileged groups. WHO has also gradually developed a "clearing-house" function, whereby it seeks to obtain as much published information as possible on the legislative/legal/human rights implications of health and environmental policies.

C. Analysis of certain constitutional provisions

22. On the basis of the foregoing, a link may be considered to exist between the environment and a number of rights enunciated in the international and regional instruments mentioned above. The right to the environment is also found to be formulated more or less explicitly in several national constitutions. Here follows a brief review of the basic laws of certain countries:

(a) The Algerian National Charter promulgated on 9 February 1986 defines the respective duties of the State, local communities, economic, social and cultural institutions, and each citizen with respect to the environment.

(b) Although not a constitution, the Bolivian Health Code of 1978 requires "all persons and corporate bodies to contribute to the maintenance and improvement of the natural physical environment and man-made environments" (art. 31).

(c) The Brazilian Constitution of 1988 lays down that "all persons are entitled to an ecologically balanced environment" (art. 225); the authorities and the community have the duty to "defend and preserve it for present and future generations".

(d) The Chinese Constitution of 1982 prescribes that "the State is to protect and improve the living environment and the ecological environment, and prevent and combat pollution and other hazards to the public" (art. 260).

(e) The Chilean Political Constitution of 1980 proclaims the "right to live in a pollution-free environment" to be one of the basic human rights.

(f) The Ecuadorian Constitution of 1984 has a similarly worded provision in section 19.

(g) The draft Ethiopian Constitution laid down that "Ethiopians have the duty to protect and conserve nature and natural resources" (art. 55).

(h) The Guatemalan Constitution of 1985 defines the duties of the State, the municipalities and all inhabitants in regard to the environment and ecological balance (art. 97).

(i) The Constitution of Guyana of 1980 affirms that "in the interests of the present and future generations, he State is to take all appropriate measures to conserve and improve the environment" (art. 36).

(j) The Haitian Constitution of 1987 lists respect for and the protection of the environment as one of the duties of all citizens (art. 52-1).

(k) The Constitution of Mozambique of 1990 lays down that "the State shall promote initiatives to ensure ecological equilibrium and the conservation and preservation of the environment with a view to improving the quality of life of citizens" (art. 37).

(l) The Namibian Constitution of 1990 defines the duties of the State in regard to the environment (art. 95).

(m) The Nepalese Constitution of 1990 lays down that the State "shall give priority to the protection of the environment of the country and also to prevent further damage due to physical developmental activities by enhancing consciousness of the general public about the environmental cleanliness" (art. 26);

(n) The Netherlands Constitution of 1983 lays down that the Government is to endeavour "to protect and improve the environment" (art. 21).

(o) The Nicaraguan Political Constitution of 1986 proclaims that all "Nicaraguans have the right to live in a healthy environment; the preservation, conservation, and restoration of the environment and natural resources are a duty of the State" (art. 60).

(p) The 1986 Constitution of the Philippines states that the "State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature" (art. 16).

(q) The Constitution of the Republic of Korea affirms that "All citizens shall have the right to a healthy and pleasant environment. The State and all citizens shall endeavour to protect the environment" (art. 35).

(r) The 1978 Constitution of Thailand requires the State "to preserve and maintain the ecological balance and to eliminate pollution that endangers the health and hygiene of the population" (sect. 65).

(s) Although not a constitution, the Vietnamese Public Health Protection Law of 1989 proclaims that citizens have a right to a "hygienic living environment" (art. 1).

Chapter II

THE RIGHT TO THE ENVIRONMENT IN RELATION TO OTHER HUMAN RIGHTS

A. Indigenous peoples' rights and the environment

23. In its resolution 1990/27 of 31 August 1990, the Sub-Commission on Prevention of Discrimination and Protection of Minorities invited the Special Rapporteur on Human Rights and the Environment to take into account the special relationship between fragile habitats and indigenous peoples, especially with regard to sustainability. The Commission on Human Rights, in its resolution 1991/44 of 5 March 1991, affirmed the important link between indigenous peoples and the environment by requesting indigenous peoples' organizations to provide information for the study. It is the intention of the Special Rapporteur to take into account the views and comments of indigenous peoples' organizations when they are communicated to her. In addition, there is a growing body of literature concerning indigenous peoples as victims of environmental degradation and as protectors of vulnerable ecosystems which will need to be reflected in the final report. In the meantime, the Special Rapporteur proposes to indicate some of the areas where further elaboration and research will be necessary.

24. Although there is no clear definition of the term "indigenous peoples", a certain number of criteria have emerged in the course of discussions in the Working Group on Indigenous Populations. Indigenous peoples are the descendants of the original inhabitants of territories since colonized by foreigners; they have distinct cultures which set them apart from the dominant society; many have, until comparatively recently, had a high degree of control over their development; indigenous peoples have a strong sense of self-identity.

25. Most relevant for the purposes of the study is the fact that indigenous peoples have a special relationship with the land and the environment in which they live. In nearly all indigenous cultures, the land is revered; "Mother Earth" is the core of their culture. The land is the home of the ancestors, the provider of everyday material needs, and the future held in trust for coming generations. According to the indigenous view, land should not be torn open and exploited - this is a violation of the Earth - nor can it be bought, sold or bartered. Furthermore, indigenous peoples have, over a long period of time, developed successful systems of land use and resource management. These systems, including nomadic pastoralism, shifting cultivation, various forms of agro-forestry, terrace agriculture, hunting, herding and fishing, were for a long time considered inefficient, unproductive and primitive. However, as world opinion grows more conscious of the environment and particularly of the damage being done to fragile habitats, there has been a corresponding interest in indigenous land-use practices. The notion of sustainability is the essence of both indigenous economies and their cultures.

26. There are over 200 million indigenous people in the world and many of them live in some of the world's most vulnerable ecosystems: the arctic and tundra, the tropical rainforests, the boreal forests, riverine and coastal zones, mountains and semi-arid rangelands. In the last 40 years or so, these lands have come under unprecedented pressure as Governments, development

banks, transnational corporations and entrepreneurs search out resources to supply the growing demand of industrialized countries as well as of the fast-swelling populations of the nations of the South. The territories used and occupied by indigenous peoples are often seen as important repositories of unexploited riches. Once largely inaccessible, these regions and their mineral deposits, hydro-electric potential, hardwoods, oil and new farm and pasture lands have been put within reach by modern technology.

27. The prevailing development process, as is being increasingly acknowledged by Member States, is not only damaging to the environment but may also be harming the way of life of many people, and especially indigenous peoples. Indeed, it can be said that all environmental degradation has a direct impact on the human rights of the indigenous peoples dependent on that environment. For example, where there is unrestrained deforestation, forest-dwelling indigenous peoples may be forced from their traditional homelands, may thereby be denied a means of livelihood, may be driven to take refuge among strangers and, in the most extreme cases, may fall victim to diseases against which they have no immunity. Similarly desertification, a phenomenon which is as much man-made as it is an act of nature, has led many self-sufficient pastoralists to an impoverished existence in refugee camps. Even smaller scale environmental sacrifices - the inundation caused by dam-building, mining, prospecting and so on - have affected indigenous peoples all over the world, causing them to leave lands they have occupied for generations, often without their willing consent or any compensation. Indigenous peoples may, thus, be victims of inappropriate development and environmental degradation. As such their fundamental freedoms and human rights are affected.

28. There has been long-standing concern for the human rights of indigenous peoples by the United Nations. This concern is reflected in the major five-volume study carried out by Mr. Martínez Cobo (E/CN.4/Sub.2/1986/7 and Add.1-4), and the establishment in 1982 of the Working Group on Indigenous Populations. Article 16 of the first revised text of the draft universal declaration of indigenous rights elaborated by Ms. Erica Irene A. Daes, the Chairperson of the Working Group, refers to the protection of the environment of indigenous peoples. More generally, the draft declaration recognizes the close affinity of indigenous peoples to the land; it also acknowledges the need to preserve a land base in order for indigenous populations to survive as a distinct people.

29. The International Labour Organisation has also adopted two conventions on indigenous and tribal peoples (Convention No. 107 adopted in 1957 and Convention No. 169 adopted in 1989) which protect the land of indigenous peoples, noting its spiritual and cultural importance. Finally, it should be noted that the April 1991 meeting of the Second Preparatory Committee for the United Nations Conference on Environment and Development requested the Secretary-General, in preparing future reports, to take into account the traditional knowledge and practices of indigenous peoples for the sustainable use, conservation, management and development of natural resources and their special relationship to the environment (decision 217 as contained in document A/46/48).

30. The standard-setting activities of the United Nations for the protection and the promotion of indigenous rights are still taking place. The rights of

indigenous peoples to a role in the national decision-making process, to the land and resources of their traditional territories, for compensation in cases of displacement, of greater control over their development, as well as other rights are under discussion. The special relationship indigenous people have to the land and the environment has yet to be recognized by a human rights instrument of the United Nations. Nor have indigenous peoples and their special knowledge of fragile ecosystems and, above all, their successful practices in protecting the environment found a place in the emerging international law concerning the environment.

B. The right to development and the environment

31. The close relationship which exists between development - recognized as a human right by several international texts including the Declaration on the Right to Development adopted by the General Assembly in its resolution 41/128 of 4 December 1986 - and the environment throws into relief the indivisible and interdependent nature of all human rights. This idea of indivisibility has already been emphasized by the Proclamation of Tehran of 13 May 1968, which states in paragraph 13 that:

> "Since human rights and fundamental freedoms are indivisible, the full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible. The achievement of lasting progress in the implementation of human rights is dependent upon sound and effective national and international policies of economic and social development."

32. General Assembly resolution 32/130 of 16 December 1977 and the subsequent resolutions on "Alternative approaches and ways and means within the United Nations system for improving the effective enjoyment of human rights and fundamental freedoms" share the objective of "reconciling" different generations of rights and rehabilitating economic, social and cultural rights. This task of reconciliation was to be completed by the Declaration on the Right to Development, which reaffirms in the preamble the principle already embodied in the Universal Declaration of Human Rights of 1948 that "everyone is entitled to a social and international order in which the rights and freedoms set forth in that Declaration can be fully realized"; in article 6 it states unequivocally that "All human rights and fundamental freedoms are indivisible and interdependent", and that they should receive equal attention and urgent consideration. Furthermore the Declaration on the Right to Development passes over neither the internal nor the external factors impeding the realization of the right to development (denial of civil, political, economic, social and cultural rights; inappropriate development policies; unfavourable national and international conditions; need to establish a new international economic order, to realize the right of peoples to self-determination and enable them to exercise their inalienable right to full sovereignty over all their natural wealth and resources; primary responsibility of States for the creation of national and international conditions favourable to the realization of the right to development, and so on).

33. Underlying the links between the right to development and the right to the environment is the notion of the indivisibility and interdependence of

all human rights, whether civil or political, economic, social or cultural. Moreover it is impossible to separate the claim to the right to a healthy and balanced environment from the claim to the right to "sustainable" development. 12/

34. The Stockholm Declaration of 1972 states as a fundamental principle that "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations". 13/ This principle affirms the inextricable link that exists not only between the environment and human rights (right to freedom, equality and dignity) but also between the environment and the right to development (right to live under adequate conditions and in an environment of a quality that permits a life of well-being and dignity).

35. For its part, the World Commission on Environment and Development established by the General Assembly in 1983, wrote a report entitled "Our Common Future" (UNEP/GC.14/13), which was submitted in April 1987 and which is a veritable plea for "sustainable development". It will be appropriate to quote a few extracts from this report, which emphasizes the interdependence of economic and ecological problems in the world at large:

> "A mainspring of economic growth is new technology, and while this technology offers the potential for slowing the dangerously rapid consumption of finite resources, it also entails high risks, including new forms of pollution and the introduction to the planet of new variations of life forms that could change evolutionary pathways. Meanwhile, the industries most heavily reliant on environmental resources and most heavily polluting are growing most rapidly in the developing world, where there is both more urgency for growth and less capacity to minimize damaging side effects" (Introduction, para. 14).

36. The World Commission analysed the crises besetting certain regions of the world and emphasized the interaction of the economy and the environment, of national development policies but also of the world economic system which takes from a poor continent more than it gives to it. The Commission points out that "Debts that they cannot pay force African nations relying on commodity sales to overuse their fragile soils, thus turning good land to desert" (Introduction, para. 19). "As a consequence of the 'debt crisis' of Latin America, that continent's natural resources are now being used not for development but to meet financial obligations to creditors abroad. This approach to the debt problem is short-sighted from several standpoints: economic, political, and environmental. It requires relatively poor countries simultaneously to accept growing poverty while exporting growing amounts of scarce resources" (Introduction, para. 20).

37. It should be noted that the Brundtland report, "Our Common Future", just cited, has been the subject of critical studies which, while acknowledging that the report "contains a number of valuable and encouraging elements, especially its documentation of the current state of various problems, its recognition that major problems are closely interrelated and its concern for achieving sustainable development", observe that "However, when it comes to

analysis of causes and prescriptions, the Report is grossly inadequate ... the Report fails to identify and analyse the fundamental causes of our problems ... the Report constitutes an enthusiastic and unquestioning reaffirmation of the system, lifestyles and values that are causing the problems under discussion". 14/

38. According to Mr. Mohammed Sahnoun, 15/ "on the morrow of Stockholm, the problems of the environment were still perceived in a specific geographical area, that of the industrialized countries, and with one simplified characteristic, pollution. Only in the course of the last five years has it been possible to detect all over a very clear awareness of the seriousness of the problem and of its many dimensions". According to this writer, since the Stockholm discussion the main aspects of the subject have been mainly centred around questions of pollution, human populations and natural resources. "However, the degradation, generally speaking, of the environment and the increased pressure brought to bear on natural resources in developing countries have not received the attention they deserve." Moreover "the approach adopted tended to concentrate far more on the effects of environmental problems than on their origins, and was characterized rather by a reaction to events and a search for remedies, where a policy of foresight and of effective and economical prevention was needed". Again, this approach did not take into account the equation "environment-development. It is difficult if not impossible to separate these two aspects". After analysing the combined effect of certain development policies on the environment, the author adds: "Today it is also widely acknowledged that certain international policies in the fields of investment, trade and aid may have harmful effects on environmental conditions. The conditions laid down by IMF, for example, may give rise to policies that generate practices that in their turn cause the destruction of the environment. The imposition of extensive agricultural production on marginal land, with the aim of increasing a given country's exports and improving its balance of payments, may have catastrophic results, as we have recently seen in Africa". The present structure of international economic relations means that the developing countries are bearing more and more of the environmental costs of certain economic transactions. After welcoming the report of the World Commission on Environment and Development, "which testifies that the members of the Commission have been sensitive to the concerns of the developing countries", Mr. Sahnoun emphasizes that "by 'sustainable development' should be understood a type of development that satisfies the needs of the present generations without thereby compromising those of generations to come. The satisfaction of human needs is the principal objective of development, and sustainable development implies the satisfaction of those fundamental needs for everybody and in a consistent manner. It is clear that a world in which poverty is endemic can only be exposed to recurrent ecological crises".

39. It is now widely recognized and acknowledged that poverty and underdevelopment have an adverse effect that causes serious damage to the environment and everywhere impedes realization of the right to development and of other fundamental rights of the individual and of peoples. This cause-and-effect relationship has been demonstrated in many studies. Thus the South Commission, in its report "The Challenge to the South", 16/ affirms that "The North, with its lifestyle conducive to waste, is mainly responsible for the degradation of the environment. But poverty too makes a heavy

contribution to that degradation, and an effective strategy designed to eliminate poverty ultimately serves to protect the environment".* The South Commission also analyses some aspects of national development strategies which, when they are inappropriate, inadequate, unsuitable or socially ill-oriented, carry great risks to the environment. By way of illustration, the South Commission argues that the absence of social services in rural areas speeds up the flight to the towns, to which the poor inhabitants emigrate in search of a better level of living (education, health, plumbing, water and well-being). This influx increases the pressure on urban social services and worsens the overpopulation of the towns. The South Commission concludes that the result is chaos and a sordid environment in the towns and desertion of the countryside, and that the only way to break out of this vicious circle is by improving education, health services, water supply and hygiene in rural areas.

40. The affirmation of "ecological rights" as a corollary of recognition of the right to the environment cannot be understood by shunning the problem of development in its national and international dimensions; hence the right to the environment cannot be conceived and realized without a global view and an approach that quite naturally integrate all considerations connected with the right to development. In this respect, the internal and external factors affecting the realization of the right to development are so many elements affecting the realization of the right to the environment. It may thus be said that a national development strategy is viable from the economic, social and ecological standpoint only if it gains the active adherence of the various social strata of the population. Such adherence cannot be gained on the basis of denying the rights of the human person, whether civil and political or social, cultural and economic (discrimination, racism, slavery, servitude, forced migration; freedom of thought, information, participation, association and expression; the right to work, to health, to an adequate level of living and to fair remuneration; cultural rights, etc.). Such adherence will also be lacking if the development model recommended is incompatible with the fundamental socio-cultural characteristics of the populations concerned. In this context attention should be drawn to some conclusions reached at the Global Consultation on the Right to Development as a Human Right organized by the United Nations at Geneva from 8 to 12 January 1990 (E/CN.4/1990/9/Rev.1):

> "Development strategies which have been oriented merely towards economic growth and financial considerations have failed to a large extent to achieve social justice; human rights have been infringed, directly and through the depersonalization of social relations, the breakdown of families and communities, and of social and economic life" (para. 153).
>
> "The world's future can only be ensured if the global environment is adequately protected and restored. In addition, all cultures and peoples form part of the common heritage of humankind and have a dignity and value that must be respected. Both environmental and cultural considerations should therefore be an integral part of national, regional and international development strategies" (para. 156).

The South Commission, for its part, has pointed out that "The purpose of the concept of viable development is to draw attention to the need to reconcile growth and environmental protection ... It is widely established that a heedless will to modernize at any cost can do irreparable harm to ecological

systems ... Development strategies and programmes will have to pay particular attention to the problems of the environment, and national accounts will have to reflect ecological costs. Society must be mobilized in favour of lifestyles that do not bring undue pressure to bear on scarce natural resources".*

41. Moreover it stands to reason that protection of the environment entails a worldwide multilateral approach and international cooperation that make it possible to uphold the development priorities of the third world countries while respecting the principles of the right to self-determination and the right of every country to its own natural resources and to the free choice of its development model.

42. Furthermore, as the South Commission pointed out in its aforementioned report, "the development countries cannot make the ecological costs their own altogether",* firstly because they lack the resources to do so; secondly because those costs may set up economic and social tensions that are liable to lead the social strata to reject an environment policy; and lastly because "it would be unacceptable that, out of concern to protect the environment, the North should impose further restrictions on the economies of the South, which are already enduring heavy indebtedness and paucity of resources, while the countries of the North maintained their environmentally damaging lifestyles. It is not possible to contemplate measures designed to protect our planet and its environment that would have the result of keeping the South in poverty and underdevelopment. That would be inadmissible"* (pp. 289 and 290). The South Commission adds that: "the North should share fully in the cost of protecting the environment of the planet and take practical measures to respond to the inevitable increase in demand from the South in the field of energy, in order to satisfy its needs for environmentally harmless investments and technologies".* The Commission acknowledges that "development models that respect the environment very often require more resources in the short term than traditional development strategies. But not to worry about the degradation of the environment would be to compromise the future of the South in the twenty-first century".*

43. The Heads of State or Government of the Non-Aligned Countries at their Ninth Summit Conference, held at Belgrade (1989), expressed their "great concern at the continuing deterioration in the state of the environment", observing "that the physical and social aspects of the deterioration of the environment are increasingly evident in developing countries". They expressed the readiness of non-aligned countries to intensify and promote international cooperation in the area of environment, emphasizing "the need to agree on a concept of sustainable development with a view to promoting effective international cooperation in environmental protection; the concept should necessarily include the meeting of basic needs of all people on our planet, stable economic growth, especially a speedier development of developing countries, as well as improving the quality of life". 17/

44. The Declaration on International Economic Cooperation, in particular the Revitalization of Economic Growth and Development of the Developing Countries, adopted by acclamation at the eighteenth special session of the General Assembly (resolution S-18/3 of 1 May 1990), pays ample heed to the environment, thus forging an inseparable link between development and the

environment. The Declaration recognizes in its paragraph 16 that "Economic development must be environmentally sound and sustainable. The deterioration of the environment is a cause of grave concern for all countries. Growing environmental problems, such as pollution, desertification, deforestation and climate change, increasingly pose a serious threat to the future growth of the world economy". The Declaration adds in its paragraph 29 that "The current threat to the environment is the common concern of all. All countries should take effective actions for the protection and enhancement of the environment in accordance with their respective capacities and responsibilities and taking into account the specific needs of developing countries. As the major sources of pollution, the developed countries have the main responsibilitiy for taking appropriate measures urgently. The economic growth and development of developing countries are essential in order to address problems of the degradation and protection of the environment. New and additional financial resources will have to be channelled to developing countries. Effective modalities for favourable access to, and transfer of, environmentally sound technologies, in particular to developing countries, including on concessional and preferential terms, should be examined".

45. The emerging consensual approach will certainly make it possible to achieve tangible results at the United Nations Conference on Environment and Development to be held in Brazil in 1992. 18/

C. Assaults on the environment and human rights; violations of human rights and assaults on the environment

1. Assaults on the environment and enjoyment of human rights

46. There is a close interaction between the assaults made on the environment and the enjoyment of human rights. Before enlarging on that assertion with illustrations, the Special Rapporteur wishes to make it clear that it cannot be generalized to the point of inferring that acts damaging to the environment are systematically dictated by a deliberate intention either to harm the environment, and thus contravene the fundamental principles of human rights, or to deny to their beneficiaries the full exercise of those rights. The fact remains that damage suffered by the environment has adverse effects on the enjoyment of human rights, the exercise of which is in many cases affected if not completely thwarted. An exhaustive study of all the human rights affected by an unfavourable environment cannot be made within the scope of this preliminary study. We shall endeavour to mention those rights which are most directly or most often affected by the most noteworthy results of environmental degradation.

47. According to Professor Galicki, "The right to life is the most important among all human rights legally guaranteed and protected by contemporary international law. On the other hand, the right to life is the one which is, most of all, connected to and dependent on proper protection of the human environment. It is because this right, like no other, may be directly and dangerously threatened by detrimental environmental measures. The right to life and the quality of life depend directly on positive or negative environmental conditions. Simultaneously, we cannot forget that this is an original right from which all other human rights derive." 19/

48. The right to health, a decent existence, work and occupational safety and health; the right to an adequate standard of living, freedom from hunger, an adequate and wholesome diet and decent housing; the right to education, culture, equality and non-discrimination, dignity and harmonious development of the personality; the right to security of person and of the family; the right to peace; and the right to development, are all rights which depend for their realization and/or respect largely on the environment. Here are a few examples to illustrate these contentions.

(a) Poverty, underdevelopment, environmental degradation and enjoyment of human rights

49. The scope of poverty has been the subject of analysis in various reports from United Nations agencies. 20/ According to the UNDP Human Development Report, more than a billion individuals in third world countries are living below the poverty line; 1.5 billion do not have access to health services; 1.75 billion do not have access to safe water; 870 million adults are still illiterate; 150 million children are malnourished and 240 million children are not in school. The report draws attention to great disparities in the state of human development and points out that three quarters of the poor in the developing countries live in rural areas despite a trend towards the urbanization of poverty. The progress report of the Secretary-General of the United Nations Conference on Environment and Development on poverty and environmental degradation (A/CONF.151/PC/15) notes the same disparities, pointing to a "close link between poverty and environmental degradation". Nearly three quarters of the poor live in ecologically vulnerable areas with low agricultural potential - arid lands, soils with low fertility, steep slopes - and in areas distant from the more rapidly growing parts of the economy. The report goes on to say that the deprivation that poverty represents also leads to the poor being more vulnerable to external or internal stress which, in its turn, exerts unbearable pressure on natural resources, arable land and grazing, reducing the productivity of marginal lands and making the poor even more susceptible to drought and other natural disasters (A/CONF.151/PC/15, paras. 8 and 9).

50. It is impossible within the scope of this study to undertake to analyse the deep-seated causes and internal and external factors that maintain the vicious circle which runs from underdevelopment through poverty to environmental degradation and back again. It is equally impossible to draw up an exhaustive or final balance sheet showing the effect of environmental degradation on human rights the enjoyment of which is already very much affected by underdevelopment and poverty (intolerable infant mortality and undernourishment; illiteracy; lack of primary health care and of social services; precarious housing; marginalization of the underprivileged strata, or even racism and discrimination; non-participation in the conduct of public affairs and in the country's political, economic and cultural decision-making, and so on).

51. It is easy to see, however, that the poor populations, the underprivileged strata, the minority groups and others are the most affected in that they are more vulnerable to ecological risks and repercussions (absence of legal and material means of protection; lack of access to information; lack of suitable care, etc.). Furthermore poverty, underdevelopment and marginalization reduce

the prospects of economic, social and cultural integration or reintegration of the victims. Those victims find themselves in a vicious circle which includes a series of violations of human rights: assaults on life and health; degradation of living conditions and disintegration of the family unit; unemployment; emigration, exodus, resettlement and even forced migrations which lead to further violations of human rights (racism; discrimination; xenophobia; acculturation; violations of dignity and arbitrary detention; refoulement; marginalization; precarious living and housing conditions; prostitution; drugs; street children, etc.).

(b) Climate changes

52. Emissions resulting from human activities increase the atmospheric concentration of gases producing a greenhouse effect. The greenhouse effect will take the form of heating up the planet, probably accompanied by a rise in the level of the sea that might seriously threaten the sea and the climate. The rise in that level in many parts of the world, in particular islands and low-lying areas, will have an effect on life, land, lifestyles, natural resources, cultural heritage and so on. Apart from the fact that the varying effects of climate on socio-economic systems have always imposed substantial constraints on development, the climate changes expected from the greenhouse effect may render those constraints utterly unbearable (effects on the water cycle and on food production chains; floods and drought; increase in the number, intensity and seriousness of natural disasters). These phenomena, while producing their own adverse effects on the enjoyment of human rights, will also worsen several existing problems and will affect most of all those populations, regions and countries that are particularly vulnerable.

(c) Deforestation and wood stripping

53. The world's forests are subjected to a great many natural and man-made pressures (climate changes; air pollution; intensive logging, etc.) which have led to substantial losses of standing timber. The stripping and wasting away of forests are in evidence in all parts of the world, whether boreal, temperate or tropical, contributing to environmental degradation (drought, desertification, erosion, genetic losses, extinction of species of fauna and flora, etc.), disorganizing local communities, their way of life and their crops, and impairing their well-being and health (see section A above).

(d) Biological diversity

54. According to the progress report of the Secretary-General of the Conference on Environment and Development on conservation of biological diversity:

> "Biological diversity is fundamental to human life. It is a basic feature of the way in which living organisms are structured. As such, it provides support for ecosystems, for the regulation of water and the atmosphere and the basis for agricultural production. When genetic variations are lost, therefore, not only are specific and potential properties and adaptations also lost, but with them species are diminished, ecosystems are impaired and the ability to sustain human life is damaged" (A/CONF.151/PC/28).

(e) Pollution, discharge of toxic and dangerous products, etc.

55. Pollution of the air, water and land from various sources, in particular through industrial disasters, presents great risks to the health, life and well-being of populations. Ecological disasters such as those of Bhopal and Chernobyl, to mention only two, have claimed many victims and caused shifts of population. According to the estimates of the League of Red Cross and Red Crescent Societies, "the Chernobyl disaster affected and still affects some 4 million people who, not to speak of the 135,000 evacuees from the villages closest to the power station, are still living on land contaminated by radiation and growing their food on it. These potential victims fear for their future, fear the illnesses and genetic mutations that the medical experts are still unable to predict; but most of them have nowhere else to go". 21/*

56. The effects of ecological accidents, whether nuclear or not, are not merely dangerous to health; they are liable to contaminate land, watercourses, the air and the atmosphere. The same applies to the discharge of untreated wastewater into the ground and into surface water bodies, leading to the concentration of chemicals, dangerous substances and pathogenic agents in living environments. Furthermore these accidents are accompanied by traumas and emotional shocks associated with the evacuation of whole communities, their displacement and the splitting up of families. Another result is the breakdown of the habitual lifestyle of the populations, who in addition live in a state of constant anxiety. The absence or shortage of reliable information about the induced or delayed effects of such disasters does nothing to reassure those populations. In some instances, where the disasters have occurred in underdeveloped regions and/or have befallen marginalized population groups, the relief, assistance and allowances extended to the victims fall far short of the requisite minimum standards, to the point where it is possible to detect practices akin to a veritable discrimination that flouts the principles of dignity and equality innate in every human being.

57. The transfer of toxic and dangerous products and wastes across frontiers and their dumping also lead to violations of human rights, not only having regard to the risks incurred by man and his environment but also considering the observed trend to export dangerous substances produced in the North to developing countries, particularly in Africa. 22/ These intolerable practices, which impose on the South risks that the industrialized countries deem too severe to be borne in the North, are particularly outrageous in that they transfer problems to particularly vulnerable regions and populations (lack of resources for monitoring and prevention and of appropriate technology; absence of suitable legislation; broken-down sanitation; information that is unreliable, unusable, non-existent or inaccessible). The Basle Convention of 1989 marks a step forward in taking responsibility for the problem although many countries, particularly in Africa, have pronounced it inadequate. 23/

2. Violations of human rights and deterioration of the environment

58. While environment degradation has adverse effects on the recognition, realization and enjoyment of human rights, similarly the denial, non-respect and violation of those rights harm the environment. The examples which follow are merely a few illustrations in support of this assertion.

(a) Right to self-determination

59. Denial of the right of peoples to self-determination and to dispose of their natural wealth and resources has been and remains one of the deep-seated causes of underdevelopment and of the serious damage inflicted on the environment in formerly colonized countries and countries still under occupation.

60. The denial of the Palestinian people's right to self-determination and Israeli practices in the occupied territories, characterized by massive and systematic violations of human rights, lie at the origin of the degradation suffered by the environment in those territories and of the damage done to the cultural heritage and living conditions of the population, who are reduced to living in camps, precarious housing and areas bereft of basic sanitation. Again, the damage done to the environment by the apartheid system is unmistakable. 24/

(b) Right to development

61. The human right to development implies, as the Declaration on the Right to Development makes clear, the full realization of the right of peoples to self-determination and to full sovereignty over all their natural wealth and resources. The pillage of a country's natural resources favoured by relations of political, economic or other subjection or dependence leads to an uncoordinated and extroverted development which, besides keeping the country in a state of chronic underdevelopment, worsens the adverse consequences which that type of development produces on the environment (intensive exploitation of raw materials and products that upsets the ecological balance; wastage of non-renewable energy resources; establishment of polluting and high-risk industries; pauperization of rural areas, etc.).

62. Moreover the Declaration on the Right to Development provides in article 1, paragraph 1, that "The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized".

63. A development strategy which did not take into account the human, social and cultural dimension could have only adverse repercussions on the environment. It was emphasized in particular at the Global Consultation on the Right to Development as a Human Right that "What constitutes 'development' is largely subjective, and in this respect development strategies must be determined by the people themselves and adapted to their particular conditions and needs" (E/CN.4/1990/9/Rev.1, para. 155). At the same Consultation it was pointed out that "Indigenous peoples have been throughout history the victims of activities carried out in the name of national development. Their direct

participation and consent in decisions regarding their own territories are thus essential to protect their right to development" (para. 157). Non-participation in decision-making at the international and national level has been and remains at the root of imposed development choices or development strategies that have done grave harm to the environment.

(c) The right to take part in the conduct of the public affairs of one's country, directly or through freely chosen representatives

64. The democratization of political structures and respect for the civil, political, economic, social and cultural rights of the individual are the essential prerequisites for development that is centred on the population and that helps to meet their real needs while conserving the environment.

(d) The right to work and to fair and satisfactory working conditions

65. Unemployment makes for the marginalization of the unemployed and for the creation of living conditions that affect the environment, including unbearable pressure on resources, flight to the towns with the development of pockets of poverty, proliferation of shanty towns, etc. "Unsatisfactory" working conditions were at the origin of such grave industrial accidents as the Bhopal disaster, which had tragic consequences for the natural and human environment.

(e) The right to information

66. The absence of reliable or accessible information and the refusal to inform contribute in more than one way to the deterioration of the environment. In the first place, the populations concerned are denied the means of taking action to prevent such deterioration. In the second place, "disinformation" in the event of an ecological accident may prove very damaging (inappropriate behaviour in the face of ecological risks may worsen the effects of the disaster). In the third place, the lack of information may cause the victims to turn against the recommended remedies or even to reject the solutions proposed for coping with the disaster.

(f) The right of peaceful assembly, association and freedom of expression

67. What has been said about the right to information applies equally to the right of assembly, association and freedom of expression. Furthermore the right to information is inconceivable without the last-mentioned right. In addition freedom of association makes it possible to organize appropriate frameworks for action, such as non-governmental organizations capable of mobilizing the human and financial resources necessary to prevent ecological risks and to cope with the problems caused by environmental degradation while helping to meet the real needs of the population.

68. The list of rights given above is not exhaustive. Encroachments on the principle of equality and non-discrimination, in relation among others to women, indigenous populations, minorities, vulnerable groups and migrant workers, make for living conditions, behaviour patterns and practices that have adverse effects on the environment. The same applies to the denial of cultural rights, immovable property rights, etc. At this preliminary stage of the study, however, it is impossible to go into the subject in detail.

Chapter III

PROCEDURAL QUESTIONS

A. Ecological rights, or the right to the environment

69. The right to an environment of a "quality" that permits a human being "a life of dignity and well-being" is a right widely recognized both at the national level (several national constitutions contain specific provisions affirming that right; see para. 22 above) and at the international level (many international texts feature recognition of that right). It should be noted, however, that the ultimate establishment of the right is impeded by two shortcomings. The first lies in the absence of a precise definition either of the concept of the "right to the environment" or of the content that right should have. The second shortcoming is concerned with its effective implementation by or on behalf of the beneficiaries.

70. In the absence of a precise definition and content for this right, the Special Rapporteur considers that it would be a mistake to strive against all odds to delimit a notion whose main characteristic - and the source of its richness - is that it evolves. Furthermore, as many writers have pointed out, the lack of a definition is not in itself an obstacle to the practical application of notions and principles which practice has done much to define. Thus A. Kiss observes that "in reality the situation is not so very different from that generally met with in the day-to-day implementation of human rights. Even when it comes to determining the content of 'traditional' rights and freedoms that have been recognized and practised in the democracies for a long time past, it may be necessary to resort to concepts that elude strict definition". 25/* The author gives as examples the freedom to profess a person's religion or beliefs, which is "recognized by all the international instruments",* but of which the "content is not as crystal clear as it looks; [and] the right to social security, the right to an adequate standard of living and the right to enjoy the highest attainable standard of health, which are recognized by articles 9, 11 and 12 respectively of the Covenant on Economic, Social and Cultural Rights and which present problems of definition".* According to A. Kiss, "the fact remains that, in the public awareness of a given geographical milieu, these notions have echoes that lead to concepts sufficiently precise to guide, where necessary, a jurist or administrator responsible for applying them ... In most cases it is impossible to give an interpretation of the rights and freedoms guaranteed to the individual without reference to a historical and social context ... It is reasonable to think that the same applies to the right to the environment; this right, like so many others, cannot be understood or applied without reference to the economic and social context of the time. Nowadays there is quite certainly a fairly clear picture in the public mind of an environment which should be conserved and from which everyone should be able to benefit". 26/* It may be added that in recent years the awareness of the nature and scope of environmental problems is such that that "picture" tends to become steadily clearer.

71. On the second point, concerning the shortcoming with regard to procedures of implementation, the Special Rapporteur considers that the marked trend towards universal recognition of this right is bound to help in developing

standards and principles to protect it. Questions relating to procedures for the implementation of this right will be examined later on. Before that, it will be well to consider whether the recognition of the right to an environment of quality - a right which should belong to everyone - necessitates the prior definition of "new rights" that could be described as "ecological rights", or whether such recognition needs only the affirmation of a "right to the environment" recognized as a human right that would give the human rights already recognized an ecological colouring with the new dimensions that would imply.

72. The replies addressed to the Special Rapporteur and the many statements made by States and organization to the Sub-Commission, the Commission on Human Rights and the General Assembly confirm the interest shown in the question of the relationship between human rights, including the right to development, and the environment. However, the position of delegations as to the specific nature of that link and the legal implications to be inferred from it has not been fully defined. Some speakers consider that it would be desirable to delimit the notion of the "right to the environment" on the basis of the human rights recognized by existing international instruments. Others concede that a start should be made by defining the "ecological rights" of the human being and going on to develop appropriate standards in that area. In this connection mention should be made of the position taken by the delegation of the Ukrainian Soviet Socialist Republic, which has shown special interest in the subject. 27/ In a document submitted to the Commission on Human Rights at its forty-sixth session under agenda item 11 on action designed to promote and develop further respect for human rights (E/CN.4/1990/49, para. 5), the Ukrainian SSR takes the following view:

> "The second important trend in international cooperation in human rights matters reflects, in the opinion of the Ukrainian SSR, the joint efforts being made by States, international bodies and special rapporteurs to develop new international human rights standards. The complex and rapidly changing circumstances of daily life are making it necessary to develop new standards of this nature that would help to protect the individual from the dangers inherent in the development of contemporary civilization. It would seem that, with a view to providing this protection, priority should undoubtedly be accorded to the task of ensuring normal conditions of life in the context of a growing ecological crisis. To this end, steps should have been taken long ago to draw up a new generation of rights, namely, ecological human rights, which in an initial approximation could include: 1. the right to ecologically clean foodstuffs; 2. the right to ecologically harmless consumer goods; 3. the right to engage in productive activities in ecologically harmless conditions; 4. the right to live in ecologically clean natural surroundings; 5. the right to obtain and disseminate reliable information on the quality of foodstuffs, consumer goods, working conditions and the state of the environment; 6. the right to participate in the solution of problems connected with the siting of industrial enterprises and the use of technology that might place the lives and health of people at risk; and 7. the right to compensation for the impairment of health due to the pollution of the environment and to other harmful influences acting on the environment or the irrational use of natural resources."

73. In the Special Rapporteur's opinion, each of the two approaches has its advantages and disadvantages. The idea of envisaging a "new generation" of rights - ecological rights - seems a priori the more attractive in that such a formula would take up more completely the ecological challenges confronting mankind, while giving the beneficiaries of those rights the legal means of protection that any recognized right confers. Thus the implementation of "ecological rights" might benefit from certain generally recognized principles of international environmental law (such as the duty of prevention; the obligation of notification; responsibility for transboundary pollution, etc.). Furthermore the notion of "ecological rights" would make it possible to transcend the "territorial" boundary within which human rights are generally confined. The fact remains that this approach might prove a long task, whereas the seriousness of ecological problems deserves speed. The development of new standards often arouses misgivings and incurs delays or even stoppages that might run counter to the objectives pursued. Again, the codification of "ecological rights" might suggest the idea of a certain dichotomy between human rights and rights concerning the environment, just as the idea of a dichotomy between civil and political rights on the one hand and economic, social and cultural rights on the other was long entertained (leading in particular to the preparation of two separate Covenants in 1966).

74. Merely to reaffirm from an ecological standpoint the human rights recognized by the existing international instruments would avoid the disadvantages of the first approach. But such a course might prove to have other limitations. In the first place it seems to us reductive inasmuch as not all human rights problems are of ecological origin and not all ecological challenges necessarily affect human rights. Furthermore the right to the environment would be irremediably confined within the logic of human rights and its implicit boundaries (the individual benefits from the standards of protection but cannot directly initiate the procedures; human rights are as a general rule territorially limited, whereas ecological rights extend into the transboundary domain). Furthermore to view the right to the environment solely from the standpoint of human rights would be to risk laying on the victims a double burden of proof, since they would have to prove that a human right had been violated or infringed by the environment and that there was a link of cause and effect between that violation and environmental degradation.

75. As we see it, a pragmatic approach could be developed by taking into account the dynamic and ceaselessly evolving nature of the notion of human rights and the capacities of those rights and the right to the environment for mutual enrichment. 28/ It seems too early to draw up an international instrument (declaration, additional protocol or other), but such a step cannot be ruled out a priori. The question calls for more thorough study and thought in which the members of the Sub-Commission are invited to join. It might be studied in the light of the results to be achieved at the Conference on Environment and Development to be held in Brazil in 1992, and in terms of the objectives to be assigned to the World Conference on Human Rights to be held in 1993. Meanwhile it would be well to reaffirm the notion of the "right to the environment" by analysing the mechanisms that might be used to implement such a right through existing procedures. While this was going on it would also be possible to refine and develop a set of human rights standards that would have direct implications for and effects on

the realization of that right. This applies in particular to the right to information, the right to participation and the right and freedom of association.

B. Procedures of implementation

76. The development of environmental protection standards has helped to affirm the right to the environment, a right recognized in various legal texts and instruments of national, regional and universal scope. However, the recognition of that right has not yet led to the establishment of appropriate legal frameworks for its effective implementation; hence some writers on the subject wonder whether the right to the environment can be regarded as a "justiciable right", respect for which could be enforced by the courts. The question also arises whether the right to the environment can be claimed by its potential beneficiaries, who the beneficiaries of this right might be, and against whom and before what courts this right could be claimed (in particular, can an individual or a group claim it at the international level, when international law traditionally governs relations between States?).

77. According to A. Kiss, 29/ the justiciability of a right is not a prerequisite for its recognition because there may be rights which their holder cannot claim. Furthermore, as in the system of protection of human rights, in which procedure has a great part to play, the right to the environment may "lend itself to implementation as practical as that of any other right guaranteed to the individual or to groups of individuals"* if it is formulated not as "the right to an ideal environment",* which would be difficult to define, but as "the right to conservation - that is to say to the protection and improvement - of the environment ...".* What is involved here, then, is a "procedural" right implying that certain procedures exist and are at the disposal of the beneficiaries, such as "the right to apply to a competent jurisdiction, hence the right to due process".* A. Kiss adds that, in view of the importance of prevention in the environmental field, "the remedies must also be applicable to future decisions ... the precondition [being] that those concerned should have the necessary information in good time".*

78. As to the capacity of individuals and groups to be subjects of international law although international law traditionally governs relations between States, it is generally acknowledged that individuals can be beneficiaries of rules designed to protect them. What is more, as Mrs. Daes states in her report on "the status of the individual and contemporary international law" (E/CN.4/Sub.2/1988/33):

> "The present stage of international law should be considered as a transitory period toward a new legal order in which the individual will be called upon to play a more important role as a subject of international rights, responsibilities and duties" (Preface, para. 7).
>
> "The world of the present era is witness of a steady increase in the number of exceptions to the principle that the individual may not directly or immediately avail himself of the rules of international law" (para. 105). "Hence, contemporary international law has been adjusting to the needs of the present day international community, recognizing certain basic minimum rights as attaching to individuals" (para. 106).

79. Developing practice tends increasingly to integrate the ecological dimension in the mechanisms for protecting the recognized rights of the person. But it is not yet possible to claim a right to the environment directly. The practice of the European Commission of Human Rights is revelatory in this respect: it declared inadmissible an application in which the applicant sought to have the discharge of atomic waste in the North Sea declared contrary to the European Convention on Human Rights. 30/ On the other hand the Commission recognized in the Arrondelle case that the "unbearable stress" suffered by an applicant living in a house situated between an airport and a motorway entitled her to claim the application of article 8 of the Convention (protection of private and family life). 31/ The way seems to be clearing towards a guarantee of the right to the environment, but it appears to lie through the guarantees afforded by traditionally recognized rights. In accepting the aforementioned complaint, the Commission nevertheless recognized not so much the applicant's right to enjoy a peaceful environment as her right to be protected against the inroads made on her private and family life by the environment.

80. The practice of the organs responsible for giving effect to international conventions on human rights, such as the Committee on Economic, Social and Cultural Rights and the Human Rights Committee, is not yet established. While the originator of a complaint certainly cannot claim violation of rights other than those recognized by the instruments that empower him to address such a complaint to the committee concerned, it would be interesting to see how far he could at least plead the effects of environment degradation on the enjoyment of recognized rights. In cases where the Human Rights Committee has had to rule on environmental matters affecting human rights, it has apparently preferred to keep as closely as possible to the rights guaranteed by the International Covenant on Civil and Political Rights. Thus in the case of B. Ominayak and the Lubicon Lake Band v. Canada, 32/ the Committee, in its decision of 26 March 1990, found that historical inequities and certain more recent developments (prospecting for oil and gas) threatened the way of life and culture of the Lubicon Lake Band and violated minority rights (art. 27 of the Covenant). This finding was preceded by another in which the Committee took care to state that "the rights protected by article 27 include the right of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong".

81. The implementation of the right to the environment appears to be making more progress in its procedural aspects associated with the realization of the right to participate in the adoption of decisions affecting the environment, the right to information and the right of association.

82. Thus, at the Sofia meeting on protection of the environment (October-November 1989) organized by the Conference on Security and Cooperation in Europe, the participating States reaffirmed:

> "Their respect for the right of individuals, groups and organizations concerned with environmental issues to express freely their views, to associate with others, to peacefully assemble, as well as to obtain, publish and distribute information on these issues, without legal and administrative impediments inconsistent with the CSCE provisions. These

individuals, groups and organizations have the right to participate in public debates on environmental issues, as well as to establish and maintain direct and independent contacts at national and international level.

"The participating States will also encourage education and instruction on environmental protection, promote the reproduction, circulation and exchange of information and data, as well as audiovisual and printed material, on environmental issues, and encourage public access to such information, data and material.

"The participating States will also stimulate exchange of information and environmental data, and foster scientific and technological cooperation in order to prevent and reduce pollution." 33/

83. An African Charter for Popular Participation in Development and Transformation was recently adopted at a meeting attended by representatives of Governments, United Nations agencies and organs and non-governmental organizations.

84. A written statement submitted by FIAN-Food first International Action Network to the Sub-Commission on Prevention of Discrimination and Protection of Minorities at its forty-second session (E/CN.4/Sub.2/1990/NGO/9) includes the following passage:

"in their ministerial declaration adopted in Bergen in May, Ministers from East and Western Europe and from North America resolved to '... safeguard the rights of individuals and concerned groups to have access to all relevant information and to be consulted and participate in the planning and decision-making concerning activities which may affect health and environment, with reasonable access to appropriate legal administrative remedies and redress.' In this connection, they resolved to contribute to the preparation of a document on environmental rights and obligations (Draft Charter of Environmental Rights and Obligations of Individuals, Groups and Organizations) for possible adoption at the 1992 United Nations Conference on Environment and Development (UNCED)."

85. On 7 June 1990 the countries of Europe recognized the right of access to information on the environment. The Council of Minister on Environment formally adopted the Directive on freedom of access to information on the environment. Save for certain exceptions laid down in the Directive itself, public authorities will be required to make information on the environment available to any natural or legal person at his request and without his having to prove an interest, but where appropriate Member States may ask for payment of a reasonable fee. For the purposes of the Directive, "information relating to the environment" means any available information in written, visual, aural or database form on the state of water, air, soil, fauna, flora, land and natural sites, and on activities (including those which give rise to nuisances such as noise) or measures adversely affecting these natural resources or likely to so affect them, and on activities or measures designed to protect them, including administrative measures and environmental management programmes. Moreover, the Director gives any person who considers that his

request for information has been unreasonably refused or ignored, or has been inadequately answered by a public authority, the right to seek a judicial or administrative review of the decision in accordance with the relevant national legal system.

86. The right to education, information and participation in decision-making in the environmental field is so important as to deserve more ample discussion at a later stage in the present report. 34/

87. Means of encouraging and mobilizing transnational corporations in the management of the environment in order to protect and enhance it in all countries, in accordance with General Assembly resolution 44/228 of 22 December 1989, are of decisive importance in implementing the right to the environment. As we learn from the reports of the Secretary-General on transnational corporations, "While all firms affect the environment and development, transnational corporations in particular play significant roles in the sectors that directly affect the global environment" inasmuch as the transnationals are, inter alia, key users of raw materials and the main source of products that can be harmful to the environment. Their operations and strategies are global in scope and include activities that are pollution-creating and possibly hazardous; they are key actors in channelling and fostering consumers' tastes, patterns of production and consumption, and lifestyles. They are key actors in the science and technology leap taking place; and they are frequently the repositories of scarce technical skills for the preservation and enhancement of the environment (E/C.10/1991/3 and Add.1, paras. 5 and 9).

88. The transnational and international aspects of the implementation of the right to the environment call for a more thorough analysis which might be undertaken during the preparation of the progress report which will be submitted in 1992.

C. Permissible limits

89. The endeavour to set limits to rights is always a risky undertaking because, if such limits are misapplied, they can take all substance out of the rights. There is no blinking the fact, however, that the recognition of rights has as its counterpart duties and obligations which, in the well-understood interest of their beneficiaries, give the rights recognized their full significance and their real dimension. As Senegal emphasized in a written proposal (E/CN.4/1989/WG.6/WP.5) reproduced in the report of the Working Group on a Draft Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (E/CN.4/1980/47) submitted to the Commission on Human Rights at its forty-sixth session:

> "The protection of rights is incumbent on every individual, group and organ of society; these have an obligation and, when this obligation is not translated into positive law, a duty and responsibility to defend them and to encourage their promotion.
>
> "The safeguarding of human rights depends not only on the commitment of the State, with which prime responsibility for their promotion and

protection lies, but also on belief in their purpose by individuals, who are their beneficiaries and are accordingly required to defend them, but also to avoid infringing them."

90. The Special Rapporteur does not propose to return to topics on which remarkable studies have already been written. 35/ However, the preliminary analysis made on the subject of human rights and the right to the environment has led her to note the possibility of conflictual relations between those rights that would make it worth while to consider the problem and to see how, by means of permissible limitations, those conflictual relations could be made to yield "potentialities of mutual enrichment".

91. The question thus arises what would be the permissible limits to the exercise of certain guaranteed human rights in order to ensure full enjoyment of the right to the environment. From another angle, what limits might be set to the right to the environment in order to prevent it from interfering with the effective enjoyment of recognized human rights? In other words, it might be useful to consider how to prevent an unduly rigid interpretation of human rights from impeding environmental protection measures, and how to prevent unduly downright recognition of the right to the environment from leading to "ecological terrorism" that would encroach upon human rights in both their individual and their collective dimension.

92. In the first case to be considered, we might explore in particular what limits compatible with the principles of human rights could be set, from an ecological standpoint, to certain rights such as the right to property (protection of sites; expropriation for ecological reasons, etc.); freedom of movement and residence (legislation on town and country planning); family rights (population policy); the right to leisure (legislation protecting the environment which may deny access to sites or prohibit certain types of activities); the right to work (dismantlement of polluting factories, for example); and so on.

93. In the second case, what fundamental principles of human rights and general international law must not be infringed for ecological reasons? (Among others, these will include the right of peoples to self-determination and to dispose of their natural wealth and resources, and the principle of free choice of development models). How are the requirements of development to be reconciled with those of ecology? What limits could be set to the right to participation (for example, should a project affecting the environment be deemed to have been adopted with due regard for the right to participation if the decision has been taken by a regularly and democratically elected Government)? Can the right to information in the environmental field be subject to restrictions (for example problems of secrecy of manufacture, access to administrative documents, etc.)?

94. By way of illustration we may note that the Economic Commission for Europe draft Charter on Environmental Rights and Obligations adopted by experts at the Oslo meeting (29-31 October 1990), contains - as its title "Rights and Obligations" suggests - an important provision (art. 22) providing that:

"The rights and obligations in this charter may be subject to restrictions prescribed by law which are necessary in a democratic society in the interests of national security, public safety, for the protection of public order, and for the protection of the rights and freedoms of others."

PRELIMINARY CONCLUSIONS

95. The universal awareness of the scope, seriousness and complexity of environmental problems has encouraged the adoption at the national, regional and world level of measures which, although sometimes piecemeal and still inadequate to meet the challenges confronting mankind, the planet and our future generations, have nevertheless made it possible to develop a set of standards and principles that share the objective of protecting the environment and thereby the rights deriving from it.

96. Those standards and principles are designed not merely to regulate the subject of the environment but also to confer veritable "ecological rights" on the holders of rights. The "right to the environment" which has been derived from them is still in gestation. There are grey areas still to be clarified, particularly with regard to the rights, duties and responsibilities involved in the recognition of such a right, whose essential characteristic is its dynamic and continuously evolving nature.

97. Because it is evolving, the right to the environment is impossible to define except in terms of a series of objectives designed to protect the environment and to safeguard the fundamental rights of the human being and the interests of future generations.

98. The link established between human rights and the right to the environment gives both categories of rights their full significance and at the same time offers them real capacity for mutual enrichment.

99. The close interaction between the environment and human rights justifies us in claiming that there is an indissoluble link between human rights and the right to the environment.

100. Consequently the right to the environment should fit quite naturally into the normative and institutional structure of protection of the rights, dignity and freedoms of the human person.

101. Although there is still a need to develop rules in order to lay a legal foundation for this right and improve the machinery for its protection, the fact remains that there are enough frameworks for action in existence at the present time for it to be effectively implemented. While such implementation does not appear to be independently feasible for the time being, it is nevertheless possible, in particular through recourse to general principles of general international law, environmental law and human rights standards, provided that they are the subject of an integrated approach that ignores neither the economic, social and cultural aspects nor the internal and external factors affecting their realization.

102. The right to the environment cannot be reduced to the right of the individual to claim an environment of quality, nor can it be separated from the problem of development and hence from the right of individuals and peoples to sustainable development. The right to the environment is, all things considered, a "right of solidarity" which involves duties and responsibilities at the national and international level.

103. The right to the environment is also a right of "prevention" of ecological risks. In this respect a series of recognized rights may take on a new dimension (right to information, right to participation, freedom of association, etc.); in addition, the right to restitution to, compensation of and rehabilitation of the victims should be viewed from the angle of the specific responsibility conferred by the absence of preventive measures.

104. The right to the environment is also a right to the "conservation" of nature for the benefit of mankind and of future generations. This is a "futurist" dimension that restores to human rights their original purpose, which has been somewhat lost to view and which it is important to rediscover.

105. The effects of environmental degradation are particularly harmful to the rights of vulnerable persons, groups and peoples. The question of vulnerability to ecological risks calls for special attention.

Notes

1/ See the Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972 (A/CONF.48/14/Rev.1).

2/ "... man's capability to transform his surroundings, if used wisely, can bring to all peoples the benefits of development ... Wrongly or heedlessly applied, the same power can do incalculable harm to human beings and the human environment." "... we must shape our actions throughout the world with a more prudent care for their environmental consequences ... through fuller knowledge and wiser action, we can achieve for ourselves and our posterity a better life in an environment more in keeping with human needs and hopes."

3/ "To achieve this environmental goal will demand the acceptance of responsibility by citizens and communities and by enterprises and institutions at every level, all sharing equitably in common efforts ... Local and national governments will bear the greatest burden for large-scale environmental policy and action within their jurisdictions ... A ... class of environmental problems ... will require extensive cooperation among nations and action by international organizations in the common interest."

4/ "States shall cooperate to develop further the international law regarding liability and compensation for the victims of pollution."

5/ "The traditional system of international law ... is a collection of 'don'ts' ... but the intensification of the concerns for the security ... is producing a different type of international law, which develops methods of cooperation." W. Friedmann, The Changing Structure of International Law, New York 1964.

6/ A. Kiss, "Définition et nature juridique d'un droit de l'homme à l'environnement", Environnement et droits de l'homme, UNESCO, 1987, p. 15.

7/ Ibid.

8/ Ibid., p. 25.

9/ J.P. Jacqué, "La protection du droit à l'environnement au niveau européen ou régional", Environnement et droits de l'homme, op.cit., p. 65. The author states that: "The right to the environment takes the form of a claim held by the citizens upon the State power, and the satisfaction of this claim depends upon action by the public authorities".* Here the procedural aspect again makes its appearance: "... the true guarantee of the right lies in the organization of procedures within the State ... that will enable private individuals to make their objections known sufficiently early in the event of a risk of damage to the environment".*

10/ OECD, "Responsibility and liability of States in relation to transfrontier pollution", 13, Environmental Policy and Law, 122, 1984.

11/ Environmental Policy and Law, 7, 1981.

12/ For this notion of "sustainable development", see the work of the World Commission on Environment and Development and General Assembly resolution 42/186 of 11 December 1987 entitled "Environmental Perspective to the Year 2000 and Beyond".

13/ See note 1/ above.

14/ Ted Trainer, "A rejection of the Brundtland Report", IFDA Dossier No. 77.1990, p. 72.

15/ "Environnement et développement, Revue algérienne des relations internationales", No. 8, 1987, OPU, Algiers.

16/ Report of the South Commission, "The Challenge to the South", 1990, Economica, p. 288.

17/ "Declaration on the Environment", Ninth Conference of Non-Aligned Countries, Belgrade, 1989 (NAC/9/EC/Doc.8/Rev.4).

18/ The ample documentation submitted to the Preparatory Committee of the Conference could not be processed by the Special Rapporteur at this stage.

19/ From observations communicated by Professor Galicki (Poland) to the Special Rapporteur.

20/ In particular World Bank, "World Development Report 1990", and "Human Development Report 1990"; United Nations Department of International Economic and Social Affairs, "World Economic Survey" (E/1990/SS/ST.ESA/218), 1990.

21/ "Spotlight Tchernobyl", Bulletin of the League of Red Cross and Red Crescent Societies, January 1991.

22/ See in particular the resolutions of the OAU (CM/Res.1225L and CM/Res.1292L), the Declaration of the Ministerial Meeting of the Coordinating Bureau of the Movement of Non-Aligned Countries, Harare, May 1989, and the information paper presented by the Sierra Club Legal Defense Fund to the Sub-Commission on Prevention of Discrimination and Protection of Minorities at its forty-second session in August 1990, entitled "Human Rights and the Environment" (p. 5).

23/ The African States prepared the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement of Hazardous Wastes within Africa, adopted on 29 January 1991.

24/ See in particular the reports of the Special Committee to Investigate Israeli Practices affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories; the reports of the Ad Hoc Working Group of Experts on Violations of Human Rights in Southern Africa; the written communication submitted by Friends of the Earth International to the Sub-Commission at its forty-second session (E/CN.4/Sub.2/1990/NGO/28); and the information paper presented by the Sierra Club Legal Defense Fund to the Sub-Commission at its forty-second session, entitled "Human Rights and the Environment".

25/ A. Kiss, op. cit., p. 19.

26/ ibid., pp. 19 and 20.

27/ See in particular the statements made by this delegation at the forty-fifth and forty-sixth sessions of the Commission on Human Rights.

28/ See in this connection Mohamed Ali Mekouar, "Le droit à l'environnement dans ses rapports avec les autres droits de l'homme", Environnement et droits de l'homme, op. cit.

29/ Op. cit.

30/ Application 715/60 cited by J.P. Jacqué, "La protection du droit à l'environnement au niveau européen ou régional", Environnement et droits de l'homme, op. cit.

31/ Application 7998/77, Annuaire de la Commission européene des droits de l'homme, vol. XXIII.

32/ Communication No. 167/1984.

33/ See document CSCE/SEM.36/Corr.1 of 2 November 1989.

34/ The Natural Heritage Institute communicated in July 1991 a working paper on the right to information and the right to participation in decision-making which the Special Rapporteur plans to process later on.

35/ See in particular the study by Mrs. Daes, Special Rapporteur of the Sub-Commission, on Freedom of the Individual under Law (United Nations publication, Sales No.: E.89.XIV.5); the report by Mrs. Questiaux, Special Rapporteur of the Sub-Commission, on the question of the human rights of persons subjected to any form of detention or imprisonment (E/CN.4/Sub.2/1982/15); and the Siracusa Principles. See also the (more recent) preliminary report by Mr. Türk and Mr. Joinet on the right to freedom of opinion and expression (E/CN.4/Sub.2/1990/11).

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REVIEW OF FURTHER DEVELOPMENTS IN FIELDS WITH WHICH THE SUB-COMMISSION HAS BEEN CONCERNED

The right to freedom of opinion and expression

Current problems of its realization and measures necessary for its strengthening and promotion

Update of the preliminary report prepared by Mr. Danilo Türk and Mr. Louis Joinet, Special Rapporteurs, in accordance with Sub-Commission decision 1990/117

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INTRODUCTION

1. On 30 August 1990 the Sub-Commission on Prevention of Discrimination and Protection of Minorities, in its decision 1990/117, took note of the preliminary report prepared by Mr. L. Joinet and Mr. D. Türk on current problems of realizing the right to freedom of opinion and expression and measures necessary for its strengthening and promotion (E/CN.4/Sub.2/1990/11). It decided to postpone consideration of the report to its forty-third session and to ask the Rapporteurs to update it. The Commission on Human Rights adopted resolution 1991/32 of 5 March 1991 in which, among other things, it welcomed the recommendations set forth in chapter IV of the preliminary report. The present paper is accordingly intended to assist the Sub-Commission in its consideration of the preliminary report.

2. In order to place this update in its context, the present paper should be studied with the aforementioned preliminary report in mind, together with the working papers prepared by Mr. L. Joinet in 1987 (E/CN.4/Sub.2/1987/15, annex I) and Mr. D. Türk in 1989 (E/CN.4/Sub.2/1982/26).

3. In the present state of our information, despite the political changes which have recently taken place in many countries, chapters I and II of the preliminary report 1/ do not seem to call for any substantial updating. Mention should, however, be made of the adoption by the Conference on Security and Cooperation in Europe (CSCE) at Copenhagen in June 1990 of the "Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE", which reaffirms inter alia the right to freedom of expression and - of particular interest to us - contains a general clause on the permissibility of restrictions to the rights enumerated.

4. The Rapporteurs' mandate is essentially to bring the preliminary report up to date in order to facilitate its discussion. The updating will be addressed mainly to the following two aspects of the subject:

- Firstly (chapter I), an analysis of further developments since the issue of the preliminary report, introduced by the replies made to the observations invited by the Rapporteurs (see preliminary report, para. 185);

- Secondly (chapter II), an update of some matters discussed in chapter III of the report, 2/ with particular attention to two questions linked to current events; the first of these (A) shows that restrictions may be justified, whereas in the second case (B) they entail serious risks. The two questions are:

  A. Freedom of opinion and expression versus the struggle against racial discrimination (see also preliminary report, chapter IV, para. 184 (4));

  B. Freedom of expression and information in armed conflicts.

I. FURTHER DEVELOPMENTS SINCE THE PUBLICATION OF THE PRELIMINARY REPORT

A. Response to the observations made in the preliminary report

5. In paragraph 185 of the preliminary report, the Rapporteurs expressed the wish to receive observations both from participants in the Sub-Commission's session and from specialist quarters. The comments made testify to the interest aroused by the report.

6. Before examining these comments, the Rapporteurs wish to reaffirm categorically that freedom of opinion and expression is a fundamental right, respect for which affects the exercise of most other rights; the comments which follow should therefore be examined in the light of this categorically restated principle, which has the force of a rule; any permissible restrictions can only be by way of exception.

7. To take an example, the observations made by the World Press Freedom Committee (WPFC), a non-governmental organization (NGO), illustrate some of the reservations encountered by the preliminary report by reason of what it says about the concepts of "restrictions permissible in a democratic society" and "democratic necessity".

8. Would it not be appropriate - asks WPFC - to give priority to freedom of expression and means of promoting it before turning to the restrictions that may be imposed on it? In support of this view, the following arguments are generally put forward:

- Since freedom of expression and freedom of the press are fundamental rights, do not restrictions imposed on journalists or organs of information, whatever they may be, constitute violations of fundamental rights that cannot be left unopposed without running the risk of legitimizing them?

- More specifically, is not any reflection on restrictions, however "permissible in a democratic society", apt - even with the best of intentions - to serve as a justification for those who seek to legitimize emergency measures taken against professionals in the information field?

- Should not future work emphasize means of reducing restrictions rather than consider cases in which such restrictions might be permitted?

9. On the general observation, the Rapporteurs consider that the defence of a freedom necessarily entails readiness to tackle the obstacles in its path; it would be paradoxical, therefore, to imagine that a freedom could be protected without considering - if only in order to be forewarned against them - the restrictions that may be imposed on it; for, as comparative law teaches us, such restrictions occur even in the countries which consider themselves the most democratic.

10. There is no question but that the preliminary report, in reviewing the scope of the international instruments for the protection of that freedom (chapter I, paras. 11-35), the better to emphasize their importance, and in describing the typologies of protection afforded by States Members of the United Nations (paras. 51-62), categorically confirms that freedom of expression and freedom of the press constitute fundamental rights.

11. Whether the Rapporteurs will or no, however, this review of the relevant texts makes it clear a contrario that, taken as a whole, the international instruments concerning freedom of opinion and expression, rightly or wrongly - that is the whole point at issue - provide for possible limitations on condition that those limitations do not call into question the actual principle of the freedom protected. Admittedly the United Nations General Assembly, in its resolution 59 (I) of 14 December 1946, reaffirmed that "Freedom of information is a fundamental human right and is the touchstone of all the freedoms to which the United Nations is consecrated".

12. The fact remains that the Universal Declaration of Human Rights of 1948, which in its article 19 protects freedom of expression, opinion and information, also contains in article 29 a general clause on restrictions permissible "in a democratic society".

13. The same applies to article 19 of the International Covenant on Civil and Political Rights, which covers the same ground.

14. Another reference: the case law of the European Court of Human Rights confirms, on the one hand, that freedom of expression constitutes one of the basic foundations of a democratic society, one of the prime conditions for its progress and for the full development of every individual; on the other hand it also emphasizes that freedom of expression may come up against the exercise of other freedoms and that it may not always be easy to set the fundamental rights and freedoms of the person in order of importance.

15. A study of current problems involved in exercising the right to freedom of opinion and expression thus unavoidably raises the question of restrictions on freedom of expression and information; that question can be evaded only by a very naive reading of the international standards or by taking the view that the promotion of freedoms - and hence the promotion of freedom of opinion and expression - can be immediate, total and absolute, whereas history teaches us that it always develops as part of a process of democratization during which the limitations on it, from pressure of opinion to institutional reform, grow less and less restrictive.

16. It was therefore thought appropriate to suggest in the preliminary report that the principles affirmed by the set of international instruments on the protection and promotion of freedom of opinion and expression should be taken as a basis for reflection and for exploring the possible reconsideration of such restrictions and derogations, however "permissible" in a democratic society.

17. It would doubtless be possible to espouse the "pure principle" of John Stuart Mill who on several occasions in the United States provided in the following terms a theoretical justification for the judicial interpretation placed on the First Amendment of 1791 to the Constitution: "The Congress shall adopt no law ... reducing freedom of speech or freedom of the press ...".* But it has to be admitted, in the words of Lord McGregor of Durris, President of the Advertising Standards Authority of London, at the Sixth International Symposium on the European Human Rights Convention and Freedom of Expression, that no democratic society has yet removed the obstacles to full freedom of expression and it is improbable that any will do so in the near future.

18. From a realistic standpoint there can be no doubt that at the present time, as the many current processes of democratization testify, reflection about the concept of "democratic necessity" is in most cases a factor for progress inasmuch as such reflection tends towards the abrogation of rules inimical to freedom of expression or helps to forewarn us against arbitrary or impermissible restrictions. The whole value of such reflection lies precisely in combining the three criteria of legality, legitimacy and democratic necessity in order to detect the actions of "those who seek to legitimize abuses against journalists and organs of information", it being understood that protection of freedom of expression cannot be limited to journalists alone.

19. A democratic society, as we have just pointed out, is in a process of continuous change; although that process includes phases of regression, it is also marked by long periods of advancement. The reference to a "democratic society" therefore presupposes, by its very nature, that restrictions on rights and freedoms will be continuously questioned, whether in order to oppose such restrictions or in order to reduce them by steadily entrenching the advances achieved. This will make it easier to understand why the Rapporteurs deemed it important to emphasize this concept. In this sense, democracy is indeed a "tragic" political system, for it is "the only regime that openly faces the possibility of its self-destruction by taking up the challenge of offering its enemies the means of contesting it" (Castoriadis).

20. Hence the purpose of the preliminary report and of this update is not to endorse the system of "restrictions permissible in a democratic society" but to describe it, analyse the risks it presents, and consider how to reduce them as part of a push for more and more democracy. Consequently:

- Firstly, the report was based on the premise that the right to freedom of opinion and expression should be interpreted extensively, in contrast to the limitations which might be imposed upon it, and which should be interpreted restrictively; hence the need to formulate "restrictions on the restrictions";

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* Translator's note. In the absence of the original English text, this passage has been translated from the French.

- Secondly, the report raised the question of derogations in exceptional circumstances by suggesting that, under such circumstances, the right to freedom of expression and information ought perhaps to be placed in the hard core of inalienable rights (paras. 167 and 168), thus supporting the thesis that the system of restrictions necessary in a democratic society should lead to making freedom of expression an inalienable right, within the meaning of the report by Mrs. N. Questiaux, when a state of emergency is declared; in other words that, even in that event, it could not be subjected to restrictions going beyond those permissible in a democratic society in normal times;

- The Rapporteurs accordingly thought that, since limitations could be regarded as permissible only if they respected the standards of a democratic society, it would be appropriate to concentrate on analysing the concept of a democratic society which is discussed in chapter II of the preliminary report. They regard this standard and that of "democratic necessity" as essential factors in determining the limits to the permissibility of restrictions. In view of the current world process of democratization, special attention should be paid to these aspects of the exercise of the right to freedom of opinion and expression with the idea of ultimately developing a normative impetus which, by hemming in the limitations more and more closely, would change the relativeness of the right to freedom of opinion and expression into a right tending towards the absolute.

B. Prisoners of opinion

21. The Commission on Human Rights, in its resolution 1991/42, decided to establish a working group composed of five experts to inform the Commission about cases of arbitrary detention occurring in the world at large. This step is a highly favourable development and one of great importance in protecting the right to freedom of opinion. As stated in the preliminary report (chapter III, and paras. 152 and 153 in particular), in the field of human rights detention is a "high-risk" measure not only as a sanction, which may be disproportionate to the requirements of the maintenance of public order, morality, etc., but also in that, like any universe of confinement, it carries the risk of leading to numerous violations of human rights. Arbitrary detention is by nature a violation of human rights and should be opposed as such. Opposition to it is necessary a fortiori whenever the practice of arbitrary detention affects prisoners of opinion: that is to say, when it is used to reduce people to silence, or directly or indirectly to restrict the right of everyone to freedom of opinion. In other words, any arbitrary detention constitutes a violation and any detention of a person by reason of his opinions is by nature arbitrary.

22. The Special Rapporteurs therefore consider that the whole of their work might be communicated to the Working Group on Arbitrary Detention in order to facilitate its task.

23. They invite the other members of the Sub-Commission to focus their comments on steps that might be taken to free prisoners of opinion and to put an end to this practice, which is especially impermissible in that, in the case in point, the offender is not the prisoner but the person who locks him up. As we have just pointed out, a person imprisoned on the sole grounds that he has expressed his opinion is of necessity detained arbitrarily, unless that opinion was expressed in defiance of a permissible restriction (defamation or advocacy of racism might be an example). In this case, however, the Sub-Commission will perhaps share the Rapporteurs' view that, even if the opinion expressed is open to sanction in virtue of a permissible restriction, that sanction should never go so far as imprisonment.

C. Violations of non-governmental origin

24. At the forty-second session a member of the Sub-Commission said that the fact that the authorities in a given country did not violate freedom of expression did not in itself warrant the conclusion that that freedom was necessarily and fully guaranteed. Even in the countries which regarded themselves as among the most democratic, violations could be - and often were - committed by organizations practising political violence, private groups, or even individuals. It was suggested to the Special Rapporteurs that they should also deal with such violations of non-governmental origin; but the time allowed was too short for them to take up that topic in the present update.

D. The question of contempt of court

25. Another member suggested that the Rapporteurs should go thoroughly into the question of contempt of court in order to think about a restrictive interpretation of that concept. In view of its scope as a measure restrictive of freedom, it was feared that it might come into unduly common use in the courts. There again there was not time to go into the matter.

E. The protection of journalists

26. The desire was expressed that more specific attention should be paid to the protection of journalists (whether or not on mission), among other measures by appointing a Special Rapporteur. It is too early for anything to be said on the subject in the present report; on the other hand the Sub-Commission might at least recommend that the protection of journalists should be taken into account among the "special procedures" of the United Nations by including a chapter on the subject in every annual report.

27. In addition the NGO Reporters Sans Frontières proposed that thought should be given, on the basis of the work already done in that field, to a draft charter of journalists' duties and rights.

F. Other developments

28. The right to freedom of opinion and expression has been supported and strengthened by many developments in 1990 and 1991. The most notable of these are bound up with the sweeping changes that have taken place in the world and

particularly in the countries of Eastern Europe. In those countries, many restrictions and derogations (censorship) which were not even "permissible in a democratic society" have been substantially reduced if not eliminated altogether. These changes have been accentuated by the pluralism gradually extended to political parties and then in the media, in particular as a result of the changes in ownership (of newspapers and radio or television channels) associated with political upheavals. While these processes should of course be encouraged, it will nevertheless be well to remain alert to the possibility of perverse results; for example freedom of opinion should not contribute to the promotion of discrimination or the advocacy of ethnic or racial hatred that any whipped-up nationalism brings in its train.

29. At all events, the positive findings just recorded should not lead to the conclusion that the situation is improving everywhere. According to the 1991 report recently published by the NGO Article 19 on "information, freedom and censorship" in the world, genuine respect for the right of everyone to freedom of opinion and expression continues to present very serious problems. Thus in 62 of the 77 countries examined in that report, persons are said to be in custody for having peacefully expressed their opinions; in the same countries, certain persons and/or their works are still banned by reason of the expression of their ideas. As a result of ethnic and/or religious conflicts, serious restrictions are said to have been placed on freedom of expression in 51 of the countries examined. Of these countries, 37 are said to be governed by state-of-emergency legislation, mainly owing to a situation of struggle against political violence. The legislation in question is said to authorize the Governments concerned to suspend the right to freedom of expression. Censorship is said to be applied in 72 countries.

II. CURRENT PROBLEMS: FREEDOM OF OPINION AND EXPRESSION IN THE CONTEXT OF THE STRUGGLE AGAINST RACISM ON THE ONE HAND AND IN ARMED CONFLICTS ON THE OTHER

A. Freedom of opinion and expression versus the struggle against racism

30. The complexity of the question becomes evident when we analyse restrictions placed on freedom of expression and information, the better to combat racial discrimination.

31. Such restrictions are acknowledged to be permissible in most of the relevant international texts; furthermore an increasing number of countries are allowing them or preparing to allow them, whether they are actually confronted with rising racism (especially in Europe, where it also takes the particular form of revisionism) or with discriminatory behaviour patterns, in particular associated with the stirring up of nationalist designs, or do so for a preventive or even educational purpose.

32. Thus the following countries have recently adopted or supplemented a specific body of legislation: Argentina (1988), Brazil (1985), China (1987), Colombia (1988), Cuba (1987), France (1990), Germany, Federal Republic of (1985), Senegal and Sweden (1989), United Kingdom (1986) and USSR (1990). The following countries have specific legislation in the drafting stage: Australia, Cameroon, Chile, Mexico, Netherlands, Niger, Spain, Sweden and Venezuela.

33. In addition the question of permissible restrictions on freedom of expression in the name of the struggle against racial discrimination has attracted the attention of several non-governmental organizations, some of them specialists in the protection of freedom of expression.

34. The NGO Article 19 recently held a conference on this subject (London, 27 and 28 April 1991). The monthly newsletter of the NGO Reporters Sans Frontières regularly publishes articles on the same topic. 3/ In a communication submitted to the Commission on Human Rights at its forty-seventh session, the NGO International Council of Jewish Women (ICJW) expressed concern at the fact that appeals to racial or religious violence were either tolerated or encouraged by certain authorities in the name of freedom of expression.

35. On the other hand a great many countries see no need for restrictions of this type, either because they claim that the phenomenon of racial discrimination is unknown to them or because they consider it dangerous to prepare "emergency" legislation on the subject and hold that the general provisions of ordinary law are sufficient.

1. What legitimacy can attach to restrictions "necessary in a democratic society" in order to combat racism?

36. The word "legitimacy" is used here in the same sense as in the preliminary report.

37. Generally speaking, freedom of opinion and expression and also freedom of information are protected; in view of this, the expression of racist ideas may perhaps be regarded as an act of disinformation that legitimizes limitations.

38. As the Inter-American Court of Human Rights aptly points out in a decision of 13 November 1985 (para. 70), a society which is not "well" informed is not a truly free society; the Court thus affirms the principle that the right to information requires that the information should be of a certain quality.

(a) The legitimacy, under the international law of human rights, of restrictions imposed to combat racism

(i) The relevant instruments

39. According to article 29 of the Universal Declaration of Human Rights, restrictions on the rights it guarantees in general terms are permissible "solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare". As we pointed out in the preliminary report (paras. 41-44), most of the international instruments subsequently concluded have embodied, in varying degrees of detail, the same grounds for the legitimacy of restrictions.

40. The CSCE document on the human dimension reaffirms in paragraph 9.1 the right to freedom of expression. "This right will include freedom to hold opinions and to receive and impart information and ideas ... The exercise of this right may be subject only to such restrictions as are prescribed by law and are consistent with international standards."

41. In a general clause on restrictions, the document makes the following point in paragraph 24: "Any restriction on rights and freedoms must, in a democratic society, relate to one of the objectives of the applicable law and be strictly proportionate to the aim of that law." Perhaps it would have been clearer to focus on the legitimacy of the objective? 4/

42. The preliminary report also drew attention to the problems involved in interpreting the grounds for legitimacy (the rights of others, public order, State security and morality) (paras. 124-126).

43. In the case of discriminatory measures, respect for the rights of others is directly concerned. The rights of others may be understood in this context to mean the right to equality but also the right to dignity and to protection against degrading treatment, or again the right to information. On the other hand, recourse to the idea of "public order", the boundaries of which are often ill-defined, presents more of a problem; in view of its vagueness, there is a great temptation to pray it in aid in irrelevant circumstances, thus committing in reality a perversion of legitimacy.

44. The grounds for restrictions connected with State security will be specifically considered in section B, dealing with freedom of expression in situations of armed conflict.

45. The notion of morality appears prima facie to be in keeping with the spirit proper to anti-racist legislation; but it carries in embryo the risk of outlawing something which is merely not accepted by everybody. The idea of a moral consensus justifying restrictive measures may carry the germ of a moral dictatorship. There is no need here to labour the dangers inherent in the will to impose a moral order - Nazism is still in all our minds - or to emphasize how dangerous it would be to plead morality in order to restrict freedom of expression.

46. Among the grounds that may be advanced for restrictions, only the concept of the rights of others, the boundaries of which are fairly clearly defined, seems apt to justify the restrictions needed in the struggle against racism. Furthermore, from the standpoint of legal technique, the reference to the rights of others affords a better basis for the strictness desirable in defining offences inasmuch as the protection of those rights involves a prejudice, which might be no more than hypothetical, and hence a right to compensation, if only of a moral nature. The number of behaviour patterns concerned would thus be strictly limited and the risk of extending the field of repression to the criminalization of mere departures from the prevailing norm would be neutralized. Lastly, it is less dangerous to freedoms to impose restrictions with the aim of reconciling conflicting rights.

47. Moreover the explicit or implicit reference to the rights of others finds an echo in certain restrictive provisions laid down in the general interest by the international instruments.

48. Thus article 29, paragraph 3, of the Universal Declaration of Human Rights provides that "These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations". This provision is supplemented by article 30, which reads as follows: "Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein."

49. The International Covenant on Civil and Political Rights states the same principle in the same terms in its article 5, paragraph 1.

50. The American Convention on Human Rights lays down the same rule in its article 29: "No provision of this Convention shall be interpreted as: (a) permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein." The same applies to article 17 of the European Convention on Human Rights, article 29 of the Universal Declaration of Human Rights and article 5 of the International Covenant on Civil and Political Rights, which use the same language.

51. At the conference already mentioned which was held by the NGO Article 19, the American Civil Liberties Union rightly emphasized that article 5 of the International Covenant and article 17 of the European Convention might justify, in the name of the rights of others, restrictive measures for the purpose of combating racial discrimination.

52. Furthermore attention was drawn to the scope of the principle embodied in article 20 of the International Covenant, which provides that: "Any propaganda for war shall be prohibited by law" and that "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law". There can be no better way of legitimizing restrictions to combat advocacy of racial hatred and incitement to discrimination.

53. The reader will need no reminder that the right to non-discriminatory treatment clearly constitutes a fundamental right of the human being, guaranteed by all the international instruments on human rights and the subject of a specific United Nations instrument which entered into force on 4 January 1969: the International Convention on the Elimination of all Forms of Racial Discrimination, known as the CERD Convention. Under article 4 of that Convention, the States Parties have undertaken to adopt positive measures designed to eradicate all incitement to racial discrimination. Such positive measures may involve restrictions on freedom of expression, for the States undertake more specifically to: "declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination," etc.

54. Thus this Convention does not confine itself to legitimizing restrictions; it goes on to state that in certain cases those restrictions may be backed by criminal penalties. It will be appropriate to return to this point and to give it special attention in connection with the criterion of democratic necessity which, in the interests of respect for human rights, presupposes inter alia proportionality of the restriction to the legitimate objective pursued. Only article 20 of the International Covenant on Civil and Political Rights and article 4 of the CERD Convention constitute specific instruments legitimizing limitations of or derogations from freedom of expression by indicating precisely what behaviour patterns justify such restrictions.

55. Here again, what is meant is propaganda for or advocacy of hatred, incitement to discrimination, hostility and violence and the dissemination of ideas based on racial superiority or hatred. This list, which appears to assume that the culpable behaviour will receive some publicity, refers by implication to the notion of indoctrination and to that of false information or disinformation.

56. Is it fair to conclude from this that freedom of expression might find grounds for a limitation in the right to be well informed? In other words, the right to be well informed might serve as grounds for sanctioning the dissemination of revisionist ideas or of an ideology based on the superiority of a particular race. On this last point it would be desirable that international instruments, before justifying measures that restrict freedom of expression, should perform their educational function properly by avoiding the use of such a term as "race" which, when applied to human beings, has no scientific meaning. Unequivocal recognition of the human race as one and indivisible appears to be regarded as the indispensable preliminary for the struggle against racism.

(ii) Decisions of international and regional authorities on protection

The Human Rights Committee

57. The Human Rights Committee has handed down few significant decisions on the subject. Of 18 selected decisions delivered by the Committee in connection with article 19, only two decisions relate to racism.

58. First case: Request 117/81 M.A. v. Italy was declared inadmissible ratione materiae by the Committee on 10 April 1984. The author of the request did not specify what articles of the Covenant he considered to have been violated. The facts were as follows: in 1971, when he was 15 years old, the applicant joined the Movimento Politico Ordine Nuovo; when this organization was disbanded in 1973 he joined the Movimento Sociale Italiano. After being prosecuted in 1974 he was sentenced in 1976 to four years' imprisonment. Before the Committee the Italian Government relied inter alia on article 19, paragraph 3, of the Covenant, arguing that the protection of national security and public order was a legitimate objective. The Committee took the view that the acts alleged against the applicants were of such a nature as to be removed from the protection of the Covenant by the operation of article 5 thereof and that in any case their prohibition was justified by article 19, paragraph 3.

59. Second case: Request (104/1981) of J.R.T. and the W.G. Party v. Canada (declared inadmissible by the Committee on 6 April 1983). The so-called "W.G." Party and the applicant were circulating, by transmitting tape-recordings over the telephone, particularly serious anti-Semitic messages. The Party's and the applicant's telephones were cut off on the basis of the Canadian Human Rights Act, which declares it a discriminatory practice to communicate telephonically any matter likely to expose a person or persons to hatred or contempt by reason inter alia of their religion or "race". The State Party held that the disputed provisions were designed to give effect to article 20 of the Covenant and that, in contrast, the author's "right" to communicate racist ideas was not protected by the Covenant.

60. The Human Rights Committee took the view that the ideas which the applicant sought to disseminate through the telephone system clearly constituted the advocacy of racial or religious hatred which Canada had an obligation under article 20 (2) of the Covenant to prohibit. It should be noted that the Committee was guided in one of the decisions by article 19, paragraph 3, and in the other by article 20, which directly legitimizes such measures without requiring it to be proved that the restriction applied on its authority is designed to protect the rights of others, public order or other legitimate objectives.

The European Commission of Human Rights

61. The European Court of Human Rights has made no explicit ruling on this question but defined the scope of article 17 of the European Convention in its very first decision (Lawless, 1 July 1961), stating that the purpose of article 17, in so far as it referred to groups or persons, was to make it impossible for them to derive from the Convention any right to engage in any activity or perform any act aimed at the destruction of any of the rights recognized in the Convention.

62. The European Commission, for its part, has delivered several interesting decisions. Firstly it should be noted that, unlike the United Nations texts, article 14 of the European Convention guarantees non-discrimination only in the exercise of a right specifically protected by the Convention. 5/ To widen this unduly narrow setting, the Commission tried, in virtue of article 3 which prohibits inhuman or degrading treatment, to give the protection of non-discrimination an independent scope of its own in these terms: "Without prejudice to article 14, discrimination based on race might under certain conditions constitute per se degrading treatment within the meaning of article 3 of the Convention"* (10 October 1970 - Ann. 13, p. 995, Asiatiques d'Afrique orientale).

63. Reference will be made here to four of the Commission's decisions which are essential in this connection. The facts on which the first decision is based are very similar to those described in request No. 117/81 to the Human Rights Committee which has already been cited. The second case concerns remarks deliberately made during an election campaign. The last two cases are concerned with revisionism.

64. First case: request (6741/74) v. Italy concerning articles 10 and 11 of the Convention and also article 14. The Commission took the view that making it a criminal offence to engage in intrigue aimed at reconstituting a fascist party was necessary to public safety and to protection of the rights and freedoms of others. Combining article 14 with article 10, it held that a difference in treatment reserved to those who were guided by fascist ideology had a legitimate purpose: namely, to protect democratic institutions. An implicit reference to article 17 of the Convention should doubtless be seen in this.

65. Second case: request (D 8348/78 and 8406/78), Glimmerveen and others v. Netherlands. The aim was to obtain a finding of violation of article 10 of the Convention and of article 3 of the First Protocol guaranteeing free elections under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature. The applicant was Chairman of the Nederlandse Volks Unie, a party supporting, in particular, the idea that it is in the general interest of a State for its population to be ethnically homogeneous. He was sentenced to two weeks' imprisonment for circulating tracts addressed to "Netherlanders of the white race" and containing such passages as the following: "The majority of our population have long since had enough of the presence in our country of hundreds of thousands of Surinamese, Turks and other immigrant workers - 'guest' workers as they are called - with whom, furthermore, there is nothing we can do here".

66. The authorities held that the content of the tract could not be described as factual information and that it constituted incitement to racial discrimination on the understanding that the notion of race included that of

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* Translator's note. In the absence of the original English text, this passage has been translated from the French.

ethnic group. (The tracts were confiscated and the electoral lists bearing the applicant's name were invalidated.) The Government drew the Commission's attention to the international obligations of the Netherlands under the CERD Convention.

67. The Commission held that the duties and responsibilities referred to in article 10, paragraph 2, found clearer expression in a more general provision, namely article 17 of the Convention.

68. The European Commission took both the CERD Convention and article 17 of the European Convention as its guide in ruling that the applicants might not invoke the provisions of article 10 of the Convention, and in declaring the request incompatible with the provisions of the Convention within the meaning of article 27, paragraph 2, and therefore inadmissible (11 October 1979). The recourse to article 17, in the same way as recourse to article 5 of the International Covenant, made it unnecessary to prove legitimacy on grounds of public order, the rights and freedoms of others or other grounds.

69. The other two cases concern revisionism.

70. Third case: request (No. 9235181) of X v. Federal Republic of Germany. The applicant complained against a judicial decision forbidding X to exhibit brochures according to which the murder of millions of Jews under the Third Reich was a lie or a piece of Zionist trickery. The authorities were guided by the texts making defamation an offence and it was specified that the ban was limited to the denial of the murder of millions of Jews. The Commission held that the murder of the Jews was a "known historic fact" established beyond doubt by overwhelming proof of all kinds. It therefore considered that the protection of the reputation of others legitimized the restriction.

71. Fourth case: the case was more complex because the author of the request (No. 9777/82), T v. Belgium, was not the direct author of the revisionist remarks. The applicant was acting as the "author-publisher responsible" for the publication of a text written by a former leader of the Belgian Rexist movement, who had been convicted of communicating with the enemy and deprived of "the right to participate in any capacity in the running, administration, writing, printing or circulation of a newspaper or any other publication in the event that such participation is of a political nature".

72. This document, entitled "Letter to the Pope concerning Auschwitz", contained a commentary calling into question the reality of the extermination of millions of Jews at Auschwitz and elsewhere and reducing the enormity of the Nazi atrocities by comparison with other wartime atrocities. The domestic authorities took the protection of morality and the rights of others and the defence of order as their guide in sentencing the applicant to one year's imprisonment and a fine of 10,000 francs and declaring the offending brochures confiscated.

73. The European Commission observed that the applicant had been prosecuted, not as co-author of an offensive piece of writing, but for having participated

in the publication of a piece of writing despite the fact that its author had been deprived of his rights. The Commission accordingly considered that the restriction on freedom of expression was necessary to the defence of order and to safeguard the authority of the judiciary.

74. Here article 10, paragraph 2, provided the Commission with sufficient grounds for legitimizing the restrictions. Does this mean that article 17 can only be relied upon when the threat to the democratic society reaches a certain degree of seriousness? This question will be considered later on during the appraisal of the criterion of the "democratic society" and its corollary, the criterion of proportionality.

(b) The legitimacy under municipal law of restrictions designed to combat racism

75. Here the Rapporteurs have essentially referred, firstly to the reports submitted by States parties to the Committee on the Elimination of Racial Discrimination (CERD), secondly to the report on freedom of the press throughout the world prepared by the NGO Reporters Sans Frontières in 1991, and lastly to the information collected at the conference already mentioned which was organized by the NGO Article 19.

76. Although almost all countries which have a written Constitution guarantee the right to equality and non-discrimination, the constitutional protection of that right is in most cases confined to nationals. Valid grounds for legitimacy must therefore be sought in individual statutes.

77. A number of countries consider, as we have already pointed out, that there is no need to refer to specific pieces of legislation in order to combat racism, either because offences under ordinary law make is unnecessary to have special legislation on the subject or because - according to them - they have no problem of racial discrimination. The question then arises whether such countries ought nevertheless to enact specific legislation even though it meets no criteria of legitimacy save that of abiding by the commitments made under the CERD Convention.

78. The criterion of democratic necessity, which is intended to preclude perversions of legitimacy, should not be used as a mere endorsement. For example, since a coup d'état in one country, the newspapers are no longer allowed to publish information which is "liable to inflame racial problems (between one ethnic group and another) or prejudicial to peace and order". Consequently most journalists are compelled to practise self-censorship, whereas the question is one that would be worth discussing democratically. In another country the head of the State security apparatus is said to have invited journalists "to write no more articles likely to upset the highest authorities of the country", thus progressively installing a mandatory prior censorship that makes it an offence to "publish articles dealing with social, regional and ethnic differences".

79. In contrast, several countries report that they have never, or almost never, had to apply provisions permitting restriction of freedom of expression

on the grounds of the struggle against racism: Australia (5 of the 26 complaints filed between 1986 and 1987 for racial discrimination interfere with freedom of expression), Chile, Cuba, Hungary, India, Jordan, Luxembourg, Mongolia, Morocco, Norway, Pakistan and Philippines. 6/ Apart from countries with a "multiracial" and "multiethnic" composition, 7/ it appears to be mainly in European countries that restrictive provisions take into account the criterion of proportionality on which the application of the principle of democratic necessity is based.

80. The legitimacy of restrictions is thus assessed in a manner which varies widely from country to country, and it is noted that the principle of democratic necessity canalizes the scope of the other two principles, that of legality and that of legitimacy.

2. The scope of the principle of democratic necessity

81. The preliminary report drew attention to some criteria relating to the concept of the democratic society such as pluralism, tolerance and the spirit of openness.

82. It will be noted that these criteria are two-edged; they may equally well justify total freedom of expression as permit limitations on that freedom with a view to preserving it, without going so far as to maintain, for example, that in a free society tolerance requires us to tolerate the intolerable. The risk is that censorship or restrictions imposed on the expression of opinions held by the majority today to be intolerable may in reality catch only marginal ideas that might be legitimate tomorrow: no one knows in advance what social, moral or intellectual evolution may become desirable or possible for the future of mankind.

83. The principle of democratic necessity therefore needs to be defined in the light of comparative law and with reference to the rights expressly guaranteed by the international instruments on the protection of human rights.

84. Comparative law shows that many countries have adopted specific and restrictive bodies of legislation in order to combat racism. It should perhaps be mentioned that the First Amendment to the United States Constitution, cited by a handful of neo-Nazis who had been refused permission to demonstrate, enabled them to win their case. A recent decision by the United States Supreme Court, however, although directly concerned not with combating racism but with the right to information, shows that the American legal system also accepts limitations. The Supreme Court, on examining an appeal on grounds of inconstitutionality against a decision prohibiting the rebroadcast of recorded telephone conversations between General Noriega in prison in Miami and the outside world, confirmed the original judgement. 8/ Thus the highest legal authority in the United States, by not invalidating an injunction reductive of freedom of the press, confers on freedom of expression a relative and not absolute character.

85. Lastly it should be noted that most specific bodies of legislation in so-called democratic States remain silent about the criteria that characterize

a "democratic society", with particular reference to the pre-eminence of law and the criterion of proportionality; the same applies to the relevant international instruments.

86. There are three possible situations of principle. Does the pre-eminence of law require that offences should be precisely defined in all their constituent elements? Does the criterion of proportionality entail weighing legitimacy of restriction against legitimacy of expression? Lastly, does proportionality preclude unduly severe restrictions or, more specifically, does it fix a threshold which cannot be undercut without threatening the very existence of freedom of opinion and expression?

(a) The definition of offences and the pre-eminence of law as a democratic necessity

87. Defining racism in terms compatible with the principle of a democratic society is a complex and difficult undertaking, as will be apparent from a study of the relevant international instruments, namely the International Covenant on Civil and Political Rights and the CERD Convention.

88. The Human Rights Committee, in a general comment on non-discrimination (CCPR/C/21/Rev.1/Add.1), after mentioning the absence of any definition in the Covenant, reproduced the definition given in article 1 of the CERD Convention and took the view that the term "discrimination" as used in the Covenant should be interpreted on the same lines, that is to say when it has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by all persons, on an equal footing, of all human rights and fundamental freedoms.

89. Discrimination, then, will be defined by its effect or intended purpose. The reference to "purpose" presents a difficulty, for in this field it is hard to distinguish from motive. In many legal systems, motive - which differs from intention - cannot be taken into account in defining an offence; taking it into account as a constituent element of an offence is generally regarded as a characteristic of totalitarian societies, and considering only the effect irrespective of the intention is regarded as a characteristic of authoritarian societies. This aspect of the problem demonstrates once again the vital importance of the criterion of a democratic society as a condition for the satisfactory functioning of standards designed to combat racism and racial discrimination. Furthermore defining racial discrimination as discrimination based on "race" and "ethnic" origin would merely increase the difficulty: how, in a democratic society, can we even attempt to define "race" or "ethnic group"? Besides, article 20 of the International Covenant calls for the prohibition of any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. Here incitement is made the main punishable act. Similarly article 4 of the CERD Convention requires States to make it an offence, apart from the dissemination of ideas, to engage in incitement to, provocation of and assistance in racist activities.

90. While the last-mentioned behaviour falls within the traditional definition of complicity, the definition of racist activities as the principal act remains an open question, while the idea of dissemination appears to require the existence of some form of publicity to represent the material element.

91. As to restrictions, the reports of States Parties to the CERD Convention show that in most instances they are couched in somewhat vague terms. Few countries mention publicity as representing the material element (Austria, Barbados, Denmark and Kuwait). For some, publicity is not even a constituent element (Sweden). Similarly, few countries refer to intention (Austria, Barbados, Belgium, Denmark and New Zealand). Some legislations work on the basis of the element of intention, a reversal of the burden of proof (France and United Kingdom).

92. Aggravating circumstances may be prescribed for non-specific offences, depending on the motive (Argentina) or the intended victim (Algeria). In the case of specific offences, publicity may also be accepted as an aggravating circumstance (Czechoslovakia).

93. Lastly, some legislations feature revisionism (France and the Federal Republic of Germany). French law in particular defines revisionism by express reference to the definition of crimes against numanity given in article 6 of the Charter of the Nürnberg Tribunal annexed to the London Agreement.

94. The Rapporteurs are in favour of an exchange of views with CERD, at a forthcoming meeting, on the definition of offences.

(b) <u>The criterion of proportionality as applied to the legitimacy of restriction and the legitimacy of expression</u>

95. Applying the principle of proportionality necessarily entails passing a value judgement on the ideas expressed, which is not the least of the difficulties - indeed, not the least of the dangers - of imposing restrictions. The interest of the person to whom the expression is addressed is taken into account.

96. Whatever degree of precision the legislator may achieve, the decisive role remains that of the judge. Even so, as we have just seen, the French Act just quoted (1990) referred back to the definition given in the Charter of the Nürnberg Tribunal and further provided that penalties would be applied only for disputing the reality of crimes against humanity whose perpetrators had been convicted by a French or an international court; the purpose of this was to avoid a situation in which, in a press trial instituted to investigate whether writings or remarks fell within the scope of the Act, the judge would find himself having to act as an historian, which would be clearly outside his competence.

97. Before the Act in question was passed in 1990, the judge (in the Faurisson case) had already found it necessary to specify that "it was not for him to confirm history or, in consequence, to take sides for or against the theses put forward by the accused", and he confined himself to a finding of defamation.

98. Can it be argued that only deliberate disinformation could justify restrictions? Between the extremes of avowed opinion and true information by way of disguised opinion, tendentious information and information about opinions, the difficulty of appraisal will be readily apparent.

(c) The criterion of proportionality as applied to the extent of the restriction by comparison with the seriousness of the behaviour

99. Article 4 of the CERD Convention enjoins States Parties to declare that the behaviour patterns it defines are offences. In most so-called democratic States, however, an offence can be defined, as we have seen, only through the characterization of an element of intention; and it is specifically this element of intention that imparts a degree of seriousness to the offending behaviour.

100. The aforementioned article 4 no more specifies the nature of the criminal penalties required than their degree of seriousness. In this connection, the question of imprisonment calls for some discussion inasmuch as it raises a problem of principle with regard to the criterion of proportionality. Can the abuse of expression really justify deprivation of liberty? Furthermore, apart from the fact that some legislations analysed in the reports of States Parties to the CERD Convention set the maximum penalties very high, and when we know to what abuses resort to imprisonment can give rise, ought not this form of penalty to be called seriously into question in the context of the present report?

101. Does not the trial that precedes the passage of sentence rather than the penalty itself, perform an educational function which is essential in this connection? Resort to the penalty of imprisonment also raises the question of its effectiveness. In view of its gravity, is there not a risk that the judges will either be reluctant to impose that penalty where they have found the perpetrator guilty, or be wary about finding that offences have been committed - which, as we have seen, is a possibility in view of the somewhat vague definition of the offences. The difficulty is illustrated by the regrettable example of a decision taken by Belgian judges who refused to qualify the term "bougnoule" as racist and decided that it meant "badly dressed".

102. But the non-effectiveness of a criminal penalty greatly reduces its educational and preventive function (see the report of the Council of Europe on decriminalization, 1980) when it does not produce the opposite effect to that intended.

103. Suspension of the right to be elected or a fortiori of the right to be a newspaper editor - other criminal penalties which can be contemplated - raises serious questions, in particular when the offender is not directly to blame, which in the case of newspaper editors is most often the case. The Rapporteurs' opinion is that these penalties should be imposed only as a deterrent, i.e. at the end of a period of multiple recidivism, implying that the offender called upon to cover the offending passages with his responsibility has in a sense been repeatedly warned to cease and desist.

104. On the other hand the right of reply - regarded as a criminal penalty, not merely as civil redress, and very widely extended to associations - and publication of the convicting judgement would not present any difficulties with regard to the principle of proportionality; the Rapporteurs encourage these measures.

105. To conclude on this point, the Rapporteurs wish to emphasize that resort to criminal penalties - accompanied by the reservations just expressed - should form part of a comprehensive policy which gives priority to the educational and preventive approach. 9/

B. Freedom of expression and information in armed conflicts: the example of the "Gulf war"

106. The preliminary report suggested that particular attention should be paid to restrictions on freedom of expression imposed by reason of exceptional circumstances, and raised in that context the question of including freedom of expression in the hard core of inalienable rights.

107. The "Gulf war", the keen controversy about freedom of expression and information that arose out of it, and the lively reactions in certain professional journalistic circles and in specialized non-governmental organizations (NGOs) 10/ restored its topicality, in connection with military censorship in time of war, to the question of justification and limits relating to the restrictions placed on freedom of expression in virtue of exceptional circumstances. In the case in point, this question became particularly acute.

108. In view of the specific nature of the kind of exceptional circumstances represented by a state of war, recourse to the mechanism prescribed for such circumstances by article 4 of the Covenant (and by article 15 of the European Convention and article 27 of the American Convention) does not seem appropriate to the situation, at least so far as the requirements of the principle of legality (notification) are concerned.

109. As we suggested in the preliminary report (para. 48), this question should be studied in the light of the criteria identified in the report by Mrs. N. Questiaux on states of emergency (E/CN.4/Sub.2/1982/15). For the sake of clarity in what follows, we shall keep to the criteria previously applied, namely: the principle of legality (formalities of proclamation and notification), the principle of legitimacy (exceptional threat) and the principle of democratic necessity (proportionality, non-discrimination and inalienability of certain fundamental rights such as the prohibition of torture).

1. The principle of legality according to the Covenant and its inappropriateness to war situations

110. From the standpoint of the principle of legality, the only formal procedure required by article 4 of the Covenant (and by article 15 of the European Convention and article 27 of the American Convention) is completion of the formalities of proclamation at the national level and of notification at the supranational level.

111. Comparative study of legal systems shows that they almost always include emergency, or war, legislation or special powers comprising rules which verge on restrictions of freedom of opinion and more particularly of expression. 11/ When these emergency measures are applied, the fact that they were already on the statute book does not exempt States from compliance with the formalities of proclamation and notification.

112. Yet to our knowledge, when war broke out in the Persian Gulf, none of the belligerents - which, moreover, are Parties to the Covenant - and specifically none of the countries of the "coalition" observed these formalities, although measures clearly restrictive of freedom of expression (measures of military censorship) were taken. The formality of the so-called "declaration of war" is no longer required by positive international law; hence the de facto existence of an armed conflict is sufficient to render respect for the Geneva Conventions of 1949 on humanitarian law applicable against the parties to the conflict. The inappropriateness of article 4 of the Covenant, to which reference has already been made, lies in this.

113. On another point, in contrast, article 4 (article 15 of the European Convention and article 25 of the American Convention) imposes a specific requirement with reference to the principle of legality: the derogative measures must not be "inconsistent with their other obligations under international law", and hence with those which may flow from other international instruments.

114. To take the aforementioned Geneva Conventions as our guide: the High Contracting Parties undertake in article 1 (which is common to all four Conventions) not merely to respect those Conventions but also - and more important - to ensure that all other High Contracting Parties respect them in all circumstances; each one thus binds itself in relation to the rest, and vice versa. These obligations include, for example, respect for various measures to protect the civilian population and in particular the prohibition of indiscriminate bombing.

115. The question to be answered, therefore, is: how far can the permissible restrictions or derogations, and in particular military censorship in wartime, constitute an obstacle to the monitoring of respect for the obligations which the High Contracting Parties have assumed pursuant to that common article 1? In other words: how, in the absence of information, can we satisfy ourselves that these requirements are being complied with?

116. The question must now be considered in relation to the principle of legitimacy (exceptional threats).

2. The principle of legitimacy according to the Covenant and its inappropriateness to war situations

117. Under the heading of exceptional circumstances, article 4 of the Covenant refers to a "public emergency which threatens the life of the nation". Similarly article 15 of the European Convention provides that the derogation clause may apply "In time of war or other public emergency threatening the

life of the nation"; article 27 of the American Convention allows the suspension of guarantees "In time of war, public danger, or other emergency that threatens the independence or security of a State Party".

118. Since these texts limit public freedoms, they can only be given a restrictive interpretation. The European Court, in the Lawless case (1961), took the view that the normal and habitual meaning of the words "In time of war or other public emergency threatening the life of the nation" was clear enough; they referred to a situation of crisis or an exceptional and imminent danger that affected the entire population and constituted a threat to the organized life of the community that made up the State. Are we to conclude from this that the expression "state of war", to which the drafters of the Covenant avoided all reference, is absorbed by the expression "public emergency which threatens the life of the nation"?

119. Although the European Commission on Human Rights and all the literature on the subject have rejected, for the purposes of article 15, the requirement of a situation of total war, i.e. of an armed conflict threatening "the very life of the nation, that is to say its frontiers and internal order, its economy and culture and the life and liberty of its citizens", 12/ it nevertheless follows from the wording used in the international instruments that the threat must be direct, otherwise article 4 of the Covenant (like article 15 and article 27 aforementioned) is not applicable. That would apply, for example, to a war waged at a distance from the national territory. The possibility of restrictions or derogations in connection with such a war therefore appears to be precluded within that territory. That was the case, for example, with the war in the Falkland Islands (Malvinas), during which it was noted that the United Kingdom appeared to have refrained from any restrictive measures on its home soil. 13/

120. In the "Gulf war", where the coalition countries were in action far from their own territory, it consequently appears to us that - from the standpoint of the principle of legitimacy - article 4 of the Covenant (togethor with the corresponding articles) was inappropriate to justify any derogations from freedom of expression and information.

121. The notion of exceptional circumstances does not constitute a legitimate purpose as such. It should be appraised for application to the principle of legitimacy only in terms of the notions of national security and public order; save in special circumstances, this means a conflict at the frontier or on the national soil. We may cite as an example of special circumstances the decision (D.7050/75) of the European Commission on Human Rights, which held in the Pat Arrowsmith case that the criminal prosecution of a person who was distributing tracts inciting soldiers to desert, and who declared that he wished to continue that activity contrary to the objectives enumerated in article 10, paragraph 2, of the Convention, constituted a necessary measure in a democratic society, since desertion by soldiers constituted a threat to national security and to order in a social group. It may logically be inferred that the solution adopted would be applied irrespective of the geographical location of the conflict.

122. On the other hand, the notion of the rights of others may justify certain restrictions, again irrespective of the geographical situation of the conflict. For example it legitimizes the ban on exposing prisoners to public curiosity (art. 13, second para., of the Third Geneva Convention of 1949) or censorship motivated by concern to protect human life.

123. Although jurists are divided as to the legitimacy of restrictions in the event of armed conflict, paradoxically this question is less controversial in professional journalistic circles. This at all events is the conclusion drawn from a sample survey taken by the NGO Reporters Sans Frontières at the time of the "Gulf war", 14/ according to which 63 per cent of the journalists questioned considered military censorship normal in wartime while 78 per cent considered that journalists should censure their own writings. In the view of 78 per cent of them, the legitimacy of such censorship lay in the protection of human life, and in that of 77 per cent in the risk of informing "the enemy". Only 15 per cent mentioned the morale of the armies.

124. This picture calls for some qualification, for an overwhelming majority (84 per cent) considered themselves to have been manipulated during the "Gulf war". Furthermore the sample survey brought out the difficulty of drawing the dividing line between the inherent requirements of the armies' morale and pro-war propaganda. The following were cited as examples of manipulation in the form of information or pictures retransmitted worldwide: the testimony of a bogus bodyguard of Mr. S. Hussein; the clip of a cormorant in an oil spill; the Iraqi "Maginot line"; information vaunting the power of the Iraqi army, the alleged disconnection of incubators in Kuwait; and the torture of a pilot after he had been injured by an ejection seat. It would have sufficed to mention some cases in which there manifestly was ill-treatment; any measures that carry the risk of being identified with manoeuvres of disinformation had no legitimacy save to justify the war. 15/

3. The principle of democratic necessity as a factor in promoting humanitarian law and the return to peace

(a) The principle of democratic necessity and the promotion of humanitarian law

125. This principle, the reader will recall, is based on the criteria of proportionality, non-discrimination and the inalienability of certain fundamental rights such as the prohibition of torture.

126. So far as the criterion of proportionality is concerned, the difficulty lies in striking the right balance between the measure of restriction or derogation (total censorship) and the military imperatives of the conflict.

127. In other words, much as a restriction in the form of partial censorship or a derogation in the form of total censorship seems permissible while a military operation is in preparation and then in execution, it is difficult from the standpoint of the principle of "democratic necessity" to justify maintaining the restriction or censorship when the operation is over. Freedom of opinion and expression should then be restored through the intermediary of freedom of information in order to make known, for example, what has become of

the civilian populations, the wounded or the prisoners of war. The application of censorship by the "loser" on the one hand, "to preserve the morale of the troops", and by the "winner" on the other hand, in order to evade all monitoring of possible violations of humanitarian law (such as the treatment of the civilian populations, for example after a bombarding attack), seems to us to conflict with respect for the principle of democratic necessity and hence should never be countenanced.

128. What justification can there be, for example, for a government authority denying journalists access to prisoner-of-war camps, shelters and hospitals when there is no longer any risk to their lives or to those of the victims?

129. What justification can there be for a television channel to "incite" its journalists to "avoid creating needless distress" by ruling out close-ups and gruesome sights connected with, say, an attack with chemical weapons? Is there not a risk of disinformation in giving credance, by omission, to the idea of a "clean war"?

130. Another risk is that the principle of non-discrimination will be breached by the intensive - or even permanent - use of the pooling system, since the composition of the pool is often based on disputed or even discriminatory choices. Restrictive measures should be appraised limitation by limitation; some restrictions or derogations, such as the use of pools, can be justified only temporarily even if the conflict is prolonged.

131. To conclude on this point, the Rapporteurs suggest that, so far as the principle of democratic necessity is concerned, restrictions and derogations should not be of such a nature as to thwart the purposes of humanitarian law, especially since humanitarian law regards as inalienable certain fundamental rights which are protected by the common article 3 of the Geneva Conventions (prohibition of torture, etc.).

132. Concern not to give strategic information away to the enemy is perfectly justifiable, but it can only be temporary; in virtue of the criterion of proportionality, as soon as the risk of informing the enemy or endangering human life has disappeared, it is well to be able to bring fully to light any violations either of inalienable rights or of the rights and principles laid down in the Geneva Conventions of 1949 and their Additional Protocols of 1977.

133. Where it has not been possible to preclude such violations it is necessary, in a democratic society, to be able to denounce them so that they may be punished.

134. In this connection we have two observations to make concerning the role of public opinion in the context of armed conflicts. Firstly, public opinion is a highly effective instrument for preventing various violations of international standards (torture, use of chemical weapons, indiscriminate bombing, attacks on civilian populations, misuse of protected international emblems, etc.); publicity is therefore needed most of all to prevent such practices. The second observation, which is indirectly connected with the present study, concerns the role of public opinion in preventing armed conflicts and public condemnation of the use of force as a sanction. In this

connection the reader will recall the words of United States President Woodrow Wilson, who envisaged making world public opinion a "cog in the machinery of sanctions based on collective security". 16/

(b) The principle of democratic necessity and the promotion of peace

135. The Rapporteurs propose that the criterion of proportionality should also be appraised bearing in mind that, while the principle of democratic necessity may justify the imposition of restrictions or derogations, that possibility should be offset by requirements for a return to democracy (state of emergency) or peace (state of war). The aim of emergency legislation is, by its very nature, to make it possible to institute measures designed to restore peace; such legislation is thus of necessity provisional in character and limited in time and should be abrogated as soon as it has achieved its purpose: to put an end to the period of tension.

136. On the same lines, the principle of democratic necessity should be examined in the light of article 5, paragraph 1, of the Covenant 17/ and article 17 of the European Convention, 18/, from neither of which is any derogation permitted. We may also mention article 72, paragraph 2, of the Vienna Convention on the Law of Treaties, which provides that "During the period of the suspension the parties shall refrain from acts tending to obstruct the resumption of the operation of the treaty".

137. In other words, as the aforementioned report by Mrs. N. Questiaux made clear, in the event of exceptional circumstances the aim pursued by restrictions and derogations should be to favour the return to democracy and, in the event of armed conflict, the return to peace. By "democratic necessity" the Rapporteurs thus mean that, in the event of war, restrictions to and derogations from freedom of expression should in some degree have as their purpose, in the last resort, the return to peace, and any measure that would interfere with that purpose would not respect the principle of proportionality and hence would not be permissible.

Notes

1/ Entitled respectively "Chapter I. Proposals for an interpretation of the legal regime governing the right to freedom of opinion and expression" and "Chapter II. Democratic processes and the elaboration of the concept of democratic society".

2/ Chapter III: "The question of permissible restrictions".

3/ See in particular Nos. 16, 17, 18, 22 and 24 for 1990 and 1991.

4/ See for example paragraph 9.5 concerning the right of everyone to leave his country and to return to it.

5/ Recently the Parliamentary Assembly of the Council of Europe again recommended that a general clause on non-discrimination should be introduced into the European Convention on Human Rights (Rec. 1134/1990), thus bringing it into line with the standards of the Covenant, which includes such a general clause.

6/ See the periodic reports to CERD.

7/ Such as New Zealand; see in particular the CERD report of 19 June 1990 (C/1984/Add.5, paras. 194-198).

8/ Decision of 18 January 1990. Cited by Reporters Sans Frontières, 1991, p.73.

9/ In this connection mention may be made of the lines pursued in France by the National Advisory Commission on Human Rights which, in its report to the Prime Minister (1990), addresses itself essentially to prevention and allows punishment only a quarter of the chapter on responses to racism.

10/ Reporters Sans Frontières: "La presse en état de guerre", 1991; Article 19: Bulletins of February and April 1991.

11/ With regard, for example, to France, the United States, the United Kingdom or the Federal Republic of Germany, see: Reporters Sans Frontières, "La presse en état de guerre", 1991.

12/ See op. Sustertenn, Rapp. Comm. 19/12/1959, Lawless.

13/ R. Ergec, "Les droits de l'homme à l'épreuve des circonstances exceptionnelles", Brussels, 1987.

14/ Reporters Sans Frontières Letter No. 23.

15/ Reporters Sans Frontières, French television channel A2, programme Sept sur Sept of 14 March 1991.

16/ P. Guggenheim, "L'organisation de l'opinion publique dans la communauté internationale", Annales d'études internationales, Geneva, 1970, p. 155. Quoted by M. Veuthey, Guérilla et droit humanitaire, Institut Henri Dunant, Geneva, 2nd. ed., 1983, p. 343. In the absence of the original English text, the quotation from President Wilson has been translated from the French.

17/ Art. 5, para. 1: "Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant."

18/ Wording identical with that of art. 5, para. 1, of the Covenant.